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90-275

Supreme Court, U.S.
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No. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

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October Term, 1990

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MARY FRANCO,

Petitioner,

vs.

AMERICAN GAS ASSOCIATION LABORATORIES, PACIFIC COAST BRANCH; AMERICAN GAS ASSOCIATION EMPLOYEES' UNION OF THE AMERICAN GAS ASSOCIATION LABORATORIES, PACIFIC COAST BRANCH,

Respondents.

_____

On Writ of Certiorari to the United States Court of Appeal for the Ninth Circuit

_____

PETITION FOR WRIT OF CERTIORARI

_____

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QUESTIONS PRESENTED

1. Did the mental infirmity of Petitioner excuse her compliance in exhausting contractual remedies under collective bargaining agreement?

2. Did the mental infirmity of Petitioner equitably toll or modify the time limitation period as set forth in Section 301 of the Labor Management Relations Act and Del Costello v. Teamsters/Must Federal Court borrow State's tolling provisions for Section 301 action?

3. Is Petitioner's Complaint not preempted by Section 301 of LMRA.

4. Did the National Labor Relations Board have exclusive jurisdiction for the prosecution of unfair labor practice as alleged in the Fourth Count of the Complaint?

5. Did Petitioner exhaust her administrative remedies under the AGA

Retirement Income Plan?

6. Was AMERICAN GAS ASSOCIATION so intricately involved in the administration of the Retirement Plan that it was a fiduciary under the Plan within the definition of ERISA?

7. Was it error for the District Court to dismiss pendent claims after suggesting they be filed in the State Courts?

8. Was it error for the Reviewing Court to affirm the Order of the District Court in granting Summary Judgment.

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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

MARY FRANCO,

Petitioner,

vs.

AMERICAN GAS ASSOCIATION LABORATORIES, PACIFIC COAST BRANCH; AMERICAN GAS ASSOCIATION EMPLOYEES' UNION OF THE AMERICAN GAS ASSOCIATION LABORATORIES, PACIFIC COAST BRANCH,

Respondents.

On Writ of Certiorari to the United States Court of Appeal, for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES SUPREME COURT -

TO THE HONORABLE CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA.

The Petitioner, MARY FRANCO, prays that a Writ of Certiorari be issued to review the Order rendered on May 14, 1990, affirming the Order granting Summary Judgment of the United States District Court, Central District of California, entered on August 8, 1988.

OPINIONS BELOW

The Order granting Summary Judgment was entered on August 8, 1988, and, upon Stipulation for Dismissal of the last remaining Defendant AGA RETIREMENT COMMITTEE, on November 18, 1988, constitutes a final order disposing of the action as to all parties and all claims. A copy of the decision of the United States District Court, Central

District of California, dated October 5, 1987, and later on August 8, 1988, unreported and is printed in Appendix "A" and "B" respectively. The decision of the United States Court of Appeal for the Ninth Circuit, dated May 14, 1990, unreported and as printed in Appendix "C" hereto.

JURISDICTION

Before this Court are Federal Questions arising from Federal Statutes. This Petition for Writ of Certiorari was filed within ninety (90) days of the date of the decision of the United States Court of Appeal for the Ninth Circuit. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254. The District Court had jurisdiction over the action under 29 U.S.C. Sections 185 and 1001. An appropriate timely appeal was made to the United States Court of Appeals for the Ninth Circuit.

QUESTIONS PRESENTED

1. Did the mental infirmity of the Petitioner excuse her compliance in exhausting contractual remedies?

2. Did the mental infirmity of the Petitioner equitably toll or modify the time limitation period as set forth in Section 301 of the Labor Management Relations Act and Del Costello v. Teamsters/ Must Federal Court borrow state's tolling provisions?

3. Is Petitioner's Complaint not preempted by Section 301 of LMRA?

4. Did the National Labor Relations Board have exclusive jurisdiction for the prosecution of the unfair labor practice charges alleged in the Fourth Count of the Complaint.

5. Did Petitioner exhaust her administrative remedies under the AGA Retirement Income Plan?

6. Was AGA so intricately

involved in the Retirement Plan that it was a fiduciary under the Plan within the definition of ERISA.

7. Was it error for the District Court to dismiss pendent claims after suggesting they be filed in the State Courts?

8. Was it error for the District Court to deny Petitioner's Motion to Remand?

9. Was it error for the Reviewing Court to affirm the Order of the District Court in granting Summary Judgment?

STATUTES INVOLVED

Section 301 of LMRA

Code of Civil Procedure Section 352 (a).

Section 10 (b) of the National Labor Relations Act. (29 U.S.C. Section 160(b).

STATEMENT OF THE CASE

A. NATURE OF CASE

MARY FRANCO, hereinafter referred to as "FRANCO", has brought this action to recover damages for Unlawful Discharge, for Employee Benefits under Collective Bargaining Agreement, Fraud and Deceit, for Unfair Labor Practices, Breach of Written Contract, Breach of Fiduciary Duty, and Breach of Fiduciary Duty under ERISA. The Complaint was filed on May 11, 1987. FRANCO was employed by AMERICAN GAS ASSOCIATION, (hereinafter referred to as "A.G.A"), from March 6, 1951 to June 30, 1984. During her employment, she alleges she suffered an occupational injury, falling from a stool which resulted in a cerebral hemorrhage. The occupational injury occurred on February 9, 1984. She was hospitalized for some length of time and was rendered mentally incapacitated. On

June 30, 1984, A.G.A terminated FRANCO from her employment. FRANCO claims that she has not received full and complete disability benefits, retirement benefits, and other benefits. She also claims that the Union, which was supposed to be her exclusive bargaining representative, was simply a fiction created by A.G.A and, when called upon, took no steps to protect the interests of FRANCO from termination or to preserve her benefits. She prayed to recover her benefits along with damages for the fraud and breach of fiduciary duty.

B. COURSE OF PROCEEDINGS

I. JUDICIAL PROCEEDINGS - DISPOSITION OF CASE

On May 11, 1987, FRANCO filed her Complaint for damages, listing seven counts: 1) Unlawful Discharge and Breach of Union's Duty of Fair Representation;

2) For Employee Benefits under Collective Bargaining Agreement; 3) Fraud and Deceit; 4) For Unfair Labor Practices; 5) Breach of Written Contract; 6) Breach of Fiduciary Duty; and 7) Breach of Fiduciary Duty under ERISA.

On July 28, 1987, Respondents A.G.A filed a Motion to Dismiss Plaintiff's Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) or, in the alternative, for Summary Judgment pursuant to Federal Rules of Civil Procedure, Section 56. The matter was scheduled for hearing on August 31, 1987.

On August 17, 1987, FRANCO filed her Opposition to Motion to Dismiss Plaintiff's Complaint pursuant to Federal Rules of Civil Procedure, Section 12(b)(1) and 12(b)(6) or, in the alternative, for Summary Judgment Pursuant to Federal Rules of Civil

Procedure, Section 56.

A.G.A filed a Reply Memorandum to FRANCO'S Opposition to the Motion for Summary Judgment and a Response Memorandum to Plaintiff's Supplemental Memorandum to the Opposition to the Motion for Summary Judgment. On October 5, 1987, the Court issued its written tentative ruling, which became the ruling of the Court, granting the Motion for Summary Judgment on Counts 1, 2, 4, and 5. Counts 3 and 6 were dismissed but with leave to amend. The Court stayed Count 7 for a 60-day period to allow Petitioner 30 days to submit information requested by Respondents and to allow Respondents 30 days following the receipt of the necessary information to review it and to take appropriate action. As to Counts 3 and 6, the Court dismissed with leave to amend for failure to comply with Local Rule 3.7.1 stating that if FRANCO

should refile these claims she "should be prepared to show cause why they should not be dismissed under the Court's discretionary power to dismiss pendent claims."

On October 29, 1987, FRANCO filed her Notice of Appeal from part of the Judgment. FRANCO appealed the granting of Summary Judgment on Counts 1, 2, 4, and 5 of the Complaint filed herein.

On or about October 26, 1987, FRANCO filed her First Amended Complaint for Damages alleging the following counts: 1) Breach of Fiduciary Duty under ERISA; 2) To recover benefits under Pension Plan; 3) To enforce rights under Pension Plan; 4) Declaratory Judgment.

FRANCO, opting not to refile the state claims for fraud and deceit and breach of fiduciary duty in the Federal Court, filed her action in the State

Superior Court on January 15, 1988.

On March 22, 1988, Defendant A.G.A removed the Superior Court case to the Federal District Court, Central District of California.

On March 31, 1988, FRANCO filed her Notice of Motion and Motion to Order Remanding Action to State Court and Request for Sanctions.

Respondents served upon Petitioner their Notice of Motion and Motion to Dismiss Plaintiff's First Amended Complaint pursuant to Federal Rules of Civil Procedure, Section 12(b)(1) and 12(b)(6) or, in the alternative, for Summary Judgment pursuant to Federal Rules of Civil Procedure, Rule 56.

On April 11, 1988, FRANCO filed her Opposition to the Motion to Dismiss Plaintiff's Complaint, pursuant to F.R.C.P. Rule 12(b)(1) and 12(b)(6).

On April 25, 1988, the Court heard argument of Counsel and took the matter under submission. On August 8, 1988, the Court rendered its written decision, which became the ruling of the Court, granting the Motion for Summary Judgment on all Counts of the First Amended Complaint ("First Action") and as to all Counts of the Complaint ("Second Action") involving State claims for fraud and deceit and breach of fiduciary duties. The Memorandum of Decision and Order was entered on August 8, 1988.

When Plaintiff filed her First Amended Complaint for Damages on October 26, 1987, she included an additional party Defendant, AMERICAN GAS ASSOCIATION RETIREMENT COMMITTEE. A.G.A. RETIREMENT COMMITTEE filed its Answer to the Complaint.

On September 6, 1988, FRANCO filed her Notice of Appeal of the Order

Granting Summary Judgment as to the entire action entered on August 8, 1988.

On or about November 18, 1988, the parties stipulated to dismiss AMERICAN GAS ASSOCIATION RETIREMENT COMMITTEE with prejudice.

The parties briefed their respective positions and argued the case on March 7, 1990. On May 14, 1990, the United States Court of Appeals for the Ninth Circuit filed its Memorandum of Decision. Petitioner seeks review of the Orders of October 5, 1987 and August 8, 1988 of the District Court and Order of May 14, 1990 of the U.S. Court of Appeals.

STATEMENT OF FACTS

MARY FRANCO was employed by A.G.A from 1951 to June 30, 1984. She worked as a draftsman for A.G.A and believed from the commencement of her

employment that she was automatically enrolled in A.G.A'S Retirement Plan. The Employee Handbook she received from A.G.A indicated that A.G.A had a Retirement Plan to protect its employees. She was informed that a union represented her interests in collective bargaining matters with her employer A.G.A. The company also had a Disability Plan in effect and other employee benefits. Over the years of her employment, she performed her job duties in a responsible fashion and was given periodic wage increases. On March 18, 1984, FRANCO turned 70 years of age. Unfortunately, on February 9, 1984, she suffered an occupational injury, by falling off a stool at work and apparently striking her head against the stool causing a cerebral accident. She suffered a cerebral hemorrhage and was hospitalized for several weeks. She did not regain her

mental faculties and she is mentally incapacitated. On June 30, 1984, A.G.A. terminated the Petitioner without reason. She received an accounting from A.G.A. as to her retirement benefits but she questioned the accuracy of the accounting. She was not admitted to the Plan before 1972. A.G.A has not given any explanation for her failure to be enrolled in the retirement program before 1972. FRANCO was not cognizant of her rights under the Collective Bargaining Agreement and was unable to protect those rights in any fashion during her mental infirmity. Her husband had consulted with two other attorneys regarding Worker's Compensation and related claims, but these attorneys were not versed in ERISA matters or collective bargaining issues. She did not become aware of her rights until she contacted her current Attorney of Record. Within six months of

becoming aware of her rights, FRANCO filed her Complaint in the Federal District Court alleging breach of the Collective Bargaining Agreement and breach of the duty of fair representation.

SUMMARY OF PETITIONER'S ARGUMENT

FRANCO claims, that because of her mental infirmity, the District Court must borrow California'a equitable tolling or modification rules to apply to Section 301 claims as expressed in Del Costello v. Teamsters. Equitable tolling is permitted under the circumstances of this case and is in line with the dictum of the Stallcop v. Kaiser, infra. Equitable tolling would make the filing of the Complaint timely, as to Counts 1, 2, 4, and 5 of the original Complaint. Secondly, equitable tolling would make the filing of the Second Action involving

State claims (Originally Counts 3 and 6 of the original Complaint) timely. The Court abused its discretion when initially stating that Counts 3 and 6 were pendent claims and should be properly brought in a State Court, and then dismiss those State claims after they had been subsequently filed in the State Court and then removed by Respondents to the Federal Court. Lastly, A.G.A is sufficiently "involved" and had control over the Retirement Committee, the Investment Manager and also the trustees of the Retirement Plan so as to be characterized as a "fiduciary" under ERISA. As a fiduciary, AGA has breached its duties owing to FRANCO. The questions raised are substantial as to require plenary consideration since borrowing of tolling provisions from state law has not been formally ruled upon by the U.S. Supreme

Court relative to Section 301 actions and the inconsistency of lower Court's decisions regarding remand issues. In this case the Federal Court of Appeals has rendered a decision in conflict with a State Court of last resort and has departed from the holding of this Court in Del Costello v. Teamsters (1983), 462 U.S. 151, relative to state tolling provisions.

ARGUMENT

SUMMARY JUDGMENT

It is a principle of law that Summary Judgment is an extreme or "drastic" remedy which should be cautiously applied and that Summary Judgment is not to be used as a substitute for the trial of disputed issues of fact, or so as to require the parties to litigate through affidavits. Associated Press v. United States (1944),

326 U.S. 1; Poller v. Columbia Broadcasting Systems, Inc. (1961), 368 U.S. 464. In this respect material submitted on a Motion for Summary Judgment should be viewed in a light most favorable to the party opposing the Motion and he should be given the benefit of all inferences reasonably deducible from the evidence. Addickes v. S.H. Kress & Company (1970), 398 U.S. 144.

The Appellate Court is empowered to conduct a de novo review of the Order Granting Summary Judgment. The District Court's Order Granting Summary Judgment is not discretionary decision and thus will be independently reviewed by the Appellate Court. Mayo v. Engel (1984), 733 F. 2d 807. The Appellate Court reviewing Summary Judgment views evidence in manner most favorable to losing party. Arnsberg v. United States (1985, 9th Cir.), 757 F. 2d 971. The

Court, in reviewing the District Court's Order Granting Summary Judgment, de novo, must determine there are no genuine questions of fact and that the District Court correctly applied the substantive law. Ashton v. Cory , 780 F. 2d 816, 818, (9th Cir., 1986). The Memorandum of Decision and Order filed on August 3, 1988 and entered on August 8, 1988 grants the Motion for Summary Judgment on the First Action and converted Defendant's Motion to Dismiss on the Second Action into a Motion for Summary Judgment and then granting said Motion. The Memorandum of Decision and Order of the District Court applies a very harsh literal application of the six-month limitation period in bringing Section 301 LMRA claims. The District Court fails to borrow California Code of Civil Procedure's equitable tolling principles, fails to remand State pendent claims, and

fails to find A.G.A a fiduciary within the definition of ERISA. Said Memorandum of Decision and Order raises important and genuine issues of fact and law as expounded on below.

1. PETITIONER IS EXEMPT BY HER MENTAL INFIRMITY FROM HAVING TO COMPLY WITH COLLECTIVE BARGAINING AGREEMENT, ARTICLE XI

Petitioner has taken steps to resolve the matters administratively before proceeding to file her Complaint. On November 12, 1986, Petitioner's Counsel, Dale M. Fiola, sent a letter to A.G.A and to its benefits department requesting an itemization to justify why FRANCO was only receiving $188.52 per month as retirement income. An inquiry was made into sick pay and vacation pay benefits from February 9, 1984 onward. In that letter, Petitioner's Counsel

states that Petitioner never was provided with periodic reviews and summaries of her retirement income. On November 26, 1986, and again on December 3, 1986, A.G.A provided some information relative to the pension plan, sick pay and vacation pay MS. FRANCO had received. Along with those letters, documentation was supplied. Between December 3, 1986 and December 30, 1986, Petitioner and Petitioner's Counsel reviewed such documents and determined that A.G.A was to pay retirement beneiits, according to its retirement income plan. On December 30, 1986, Petitioner's Counsel sent a letter to A.G.A noting this highly visible error in calculating FRANCO'S benefits. In that letter, Petitioner's Counsel also queried why MARY FRANCO was never informed about participation in any pension or retirement program prior to 1972. A.G.A asserts that MARY FRANCO

waived her rights to participate in a group annuity plan that was insured through Equitable Life Insurance Society of the United States. The waiver card shows that MARY FRANCO executed the waiver on July 2, 1957 and there was no further explanation given by A.G.A. as to why no additional waivers were executed by the employee from 1957 to 1972; a period of 15 years. On December 30, 1986, Petitioner's Counsel also sent to the Union, AMERICAN GAS ASSOCIATION LABORATORIES - PACIFIC COAST BRANCH, a letter requesting the Union to file a grievance for FRANCO that her retirement benefits have been seriously and grossly miscalculated, her life insurance, sick pay and vacation pay have not been properly accounted for and she believes that she was wrongfully discharged. That letter was received on or about January 8, 1987 allegedly by the Union. This

letter was sent to the only known address for the Union. The Collective Bargaining Agreement, as attached to the Complaint as Exhibit "B", does not specify where the Union's headquarters is, the person Union members are to contact for grievances, and who are the union officials. The Collective Bargaining Agreement on Page 1 indicates the Union is the sole and exclusive collective bargaining agent for all technical and professional employees employed only at the Pacific Coast Branch Laboratories of AMERICAN GAS ASSOCIATION, at 1425 Grande Vista Avenue, Los Angeles, California 90023. The letter sent to the Union was sent to that exact address. At no time after sending such letter up to the time of filing the Complaint on May 11, 1987, did the Union contact MARY FRANCO or her attorney. Petitioner was not required to exhaust her administrative remedies

before bringing a suit for breach of the collective bargaining agreement, and, even if she was required to, such performance would be excused when it would be futile.

A suit for breach of the collective bargaining agreement covered by 29 U.S.C. Section 185(a), namely Section 301 of the LMRA, may be maintained notwithstanding a failure to exhaust administrative remedies. Vaca v. Sipes (1966), 386 U.S. 171. It has been held that even if a collective bargaining agreement establishes exclusive contractual remedies for the enforcement of contractual rights, an employee may sue without exhausting those remedies if the effort to proceed formally with contractual or administrative remedies would be wholly futile. The futility of exhausting contractual remedies is established, so as to permit a suit

notwithstanding a failure to exhaust those remedies, where the union member shows that either the employer has repudiated the contractual remedies or the Union has breached his duty of fair representation in handling the union member's grievance. Glover v. St. Louis - San Francisco R. Company (1969), 393 U.S. 324. Clayton v. International Union, United Auto, etc. (1981), 451 U.S. 679. A Union's breach of its duty of fair representation in handling an employee's grievance can excuse the employee's exhaustion of the grievance procedure before suing the employer for breach of agreement. The employee can show that the Union has sole powers to invoke the higher stages of grievance procedure and that the Union's refusal to process the grievance was wrongful, arbitrary or in bad faith. Fristoe v. Reynolds Metal Company (1980), 615 F.2d

1209. Burns v. Supermarkets General Corp (1985), 615 F.Supp. 154. It is undisputed that the Union took no action on MARY FRANCO'S request to file a grievance on her behalf for over five months. The Union must be held on notice that there are certain time requirements for processing a grievance through the Union. The Union took no steps and such failure to take steps is tantamount to bad faith, arbitrary and wrongful conduct.

Tc the issue of tolling, on or about February 9, 1984, Petitioner MARY FRANCO slipped off her stool at work, injuring her head which resulted in irreversible mental impairment. Such mental infirmity tolls the statute of limitations until such infirmity is corrected. Code of Civil Procedure, Section 352 specifically states:

"(a) If a person entitled to

bring an action, mentioned in Chapter 3 of this Title, be at the time of the cause of action accrued, either: (1) Under the age of majority; or (2) insane; or..."

Any requirement on the part of the Plaintiff to comply with Article XI of the Collective Bargaining Agreement as to time limits is tolled until Petitioner's mental infirmity has been corrected or remedied. Petitioner did not become aware until December 29, 1986 of the dispute with her employer concerning her retirement benefits, vacation and sick pay and various other employee benefits. Within ten working days after becoming aware of such miscalculations by A.G.A, on December 30, 1986, Petitioner's Counsel notified the Union and employer of such miscalculations and requested the

implementation of grievance procedures to resolve the dispute. No steps were taken by the employer or the Union to undergo a grievance. Petitioner's performance under Article XI is excused for the foregoing reasons.

The requirements of exhausting administrative remedies was mentioned in Republic Steel Corporation v. Maddox (1965), 379 U.S. 650, which places upon the Union a requirement to act diligently in processing the grievance of its Union members.

See also Schneider Moving and Storage v. Robbins et al., 466 U.S. 364 (1984).

The Court has recently rejected a constrained view of insanity for tolling purposes and have viewed a finding of "mentally disabled condition" as sufficient to toll the statute of limitations for filing purposes.

Llewellyn v. Celanese Corp. (1988), 693 F. Supp. 369, 379; Lopez v. Citibank, 808 F.2d 905, 906 (1987); Barnell v. Pain, Weber, Jackson and Curtis, (1988), 614 F. Supp. 373.

MARY FRANCO is excused and exempt from the rules of Article XI requiring notification to the employer within ten working days after the occurrence.

2. PETITIONER'S COMPLAINT IS NOT TIME BARRED BY THE LIMITATION PERIOD OF SECTION 10(b) OF NLRA AS APPLIED IN DEL COSTELLO

For the reasons of the mental incapacity of Petitioner, the six month limitation period as referred to in Del Costello v. Teamsters (1983), 462 U.S. 151, does not apply. The Court in Del Costello specifically referred to "borrowing" from the most closely

analogous statute of limitations under State Law.

The Court, in Del Costello, borrowed 10(b) of the National Labor Relations Act to enforce a six-month statute of limitations, when there was an absence of a Federal statute of limitations on Section 301 claims. The Petitioner argues that if the Court is to borrow the six-month time limitation period for Section 301 claims, it is obligated to borrow from the "most closely analogous tolling provisions under State law" where Congress has not spoken. It is Petitioner's argument that the District Court should have borrowed from California's tolling statutes regarding mental incapacity as set forth in Code of Civil Procedure, Section 352(a)(2). The mental deficiency of the Petitioner tolls the six-month limitation period. The term "insane" within the

section means such condition of mental derangement as actually to bar the sufferer from comprehending rights when she is otherwise bound to know and embraces temporary unsoundness of mind as well as chronic or fixed insanity; the words "insane" and "incompetent" are not necessary convertible terms, and the person may be incompetent by reason of insanity or from some other cause. Gottesman v. Simon (1959), 169 C.A.2d 494. It has been held that a finding that a person was incapable of caring for her property or transacting business or understanding the nature and affect of her acts was equivalent to a finding that she was insane within the meaning of this section. Pearl v. Pearl (1918), 177 C. 303. The Court in Stallcop v. Kaiser Foundation Hospitals, (9th Cir., 1987), 820 F. 2d 1044, defined that there are two types of equitable modification:

equitable tolling and equitable estoppel. Equitable tolling focuses on plaintiff's actions; whereas equitable estoppel focuses on defendant's actions. For equitable tolling to apply the plaintiff must show excusable ignorance. In Stallcop, plaintiff had consulted 3 lawyers, in FRANCO, she did not consult attorneys relative to her employment benefits entitlement. Her mental incapacity was sufficient to establish excusable ignorance. For equitable estoppel to apply, there must be evidence shown of improper purpose by defendants of actual or constructive knowledge that their conduct was deceptive. Defendants practiced deception in creating an "illusory" union which Petitioner relied upon in believing it would protect her interests and would process her grievance. Hsu v. Mt. Zion Hospital (1968), 259 C.A. 2d 562. Once

Petitioner received documents from A.G.A. in December, 1986 and analyzed those documents to determine there were gross miscalculations, it was at that point that a dispute arose as defined in the collective bargaining agreement. Letters were sent to Employer and the Union requesting that a grievance be filed. Within six months of the realization of such dispute and grievance, Petitioner properly filed an Unfair Labor Practice Charge with the National Labor Relations Board and coextensively filed her Complaint in the District Court. Within six months from the time of the dispute, FRANCO exhausted all of her remedies prior to filing the Complaint. The Union has not processed the grievance of FRANCO and has not responded at all. Several calls were made to the Union by FRANCO'S counsel and it was determined that there was no business headquarters of the Union

and that the Union was allegedly operating out of the residence of an employee in Long Beach. No one was ever there during regular business hours to receive phone calls or conduct business. MARY FRANCO believes that the Union used the corporate headquarters of A.G.A. and that corporate officers acted as representatives or intermediaries for questions regarding the Collective Bargaining Agreement. In essence, the employer has practiced fraud upon its employees by stating there was a Union and there was a Collective Bargaining Agreement, when in fact there was none. FRANCO did not become aware of this fraud until April of 1987. The Union and the employer have a responsibility not to act dishonestly and arbitrarily.

Since the Union is essentially a "straw" union created by its employer, there has been a depravity precipitated

upon FRANCO amounting to fraud. That fraud did not evidence itself until some time in April of 1987, when FRANCO'S counsel attempted to contact the Union at the corporate headquarters and was informed by a corporate secretary that, "This is not your usual type of Union," and that a corporate officer would be fielding questions regarding the Union and the Collective Bargaining Agreement. The fraud precipitated by the Employer and alleged Union should be used to estop A.G.A from asserting the limitation period of Section 10(b) of NLRA as expressed in Del Costello v. Teamsters.

The District Court refused to apply the tolling provisions of C.C.P., Section 352(a)(2) for several reasons. First, the standard Federal Rule on tolling of the statute of limitations is that mental disability is not a valid reason to toll a statute. Secondly,

Federal equitable tolling principles would be inconsistent with the policies which the Del Costello decision is based. Thirdly, uniformity under Section 301 of NRLA will only be blurred if tolling is permitted. Fourthly, Congress has spoken by permitting equitable tolling in only one situation, service in the Armed Forces.

The difficulty with the District Court decision is that it sacrifices equity for uniformity of Labor Law. In short, it completely disregards "borrowing" of closely analogous State statute of limitations. Even the Del Costello v. Teamsters case remanded the matter for further proceedings to determine tolling provisions under local state laws. There is no question that Del Costello is the seminal case involving the borrowing of a statute of limitations, and that borrowing includes

tolling provisions under State law.

Since Section 160(b) of the Labor Management Relations Act does not specify any exceptions, other than tolling for individuals in military service, state law applies where federal law has not preempted, and the tolling provision of Code of Civil Procedure, Section 352(a)(2) applies and tolls the statute of limitations relative to 29 U.S.C., Section 160(b).

Notwithstanding FRANCO'S mental incapacity, the Court has created a tolling period for fraud. It has been held when a party has been injured by fraud and remains ignorant of the fraud without any fault or want of diligence or care on his part, a bar of statute of limitations does not begin to run until fraud is discovered, and doctrinal or fraudulent concealment tolled the six month statute of limitations.

International Ladies Garment Workers Union v. N.L.R.B. (1972), 463 F.2d 907. It has been held that the six-month statute of limitations does not start to run until the injured party knows or should know that statutory rights were violated. Amcar Div. ACF Industries v. N.L.R.B. (1979, CA8), 592 F2d 422. FRANCO'S request for filing Grievance was made to the Union, the Unfair Labor Practice Charge, and the Complaint were filed within the six-month period after "awareness" of the legitimacy of the dispute as to benefits FRANCO was entitled to receive from Employer A.G.A. FRANCO did not become aware of the legitimacy of the dispute as to her benefits until December 29, 1986. She did not become aware of the fraud as to the employer run and controlled UNION until April 30, 1987. The Unfair Labor Practice Charge was filed May 11, 1987

and dealt with the issues of fraud and employee benefit entitlements. The Complaint was filed the same day. In the absence of Federal law regarding the tolling provisions, the Court must borrow Code of Civil Procedure, Section 352(a)(2) as to tolling of the six month statute of limitations relative to the mental incapacity and infirmity of FRANCO.

3. PETITIONER'S COMPLAINT IS NOT PREEMPTED BY 301 OF THE LMRA.

There can be no preemption of the Third Count of the First Action for Fraud and Deceit when the subject matter of the fraud as to an Employer run and operated Union touches on overriding state interest or interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, a

Court cannot infer that Congress deprived the states of their powers to act.

The Allis-Chalmers v. Lueck case, 471 U.S. 202, is the seminal case on this point. After the District Court's order of October 5, 1987, dismissing Count 3 and 6 of the original Complaint with leave to amend, Petitioner chose to file her claims in the State Court because of the Court's characterization of those Counts as State claims, tied only to the Federal Courts through pendent jurisdiction. The Complaint for Damages (Second Action) sets forth five Causes of Action; 1) Fraud and Deceit; 2) Breach of Fiduciary Duty; 3) Breach of Covenant of Good Faith and Fair Dealing; 4) Intentional Infliction of Emotional Distress; and 5) Negligent Infliction of Emotional Distress. The gravamen of the Complaint alleges fraudulent representations made

to Petitioner that she was a member of the Employees' Union of the American Gas Association Laboratories, Pacific Coast Branch and that there was a Collective Bargaining Agreement in effect governing employees. The allegations of the Complaint state that Petitioner was not included in the Collective Bargaining Agreement and that A.G.A. did not recognize an independent union. The allegations are made in the Second Cause of Action whereby Petitioner states that "corporate officers acted as union officers and represented us and did not process in a timely basis the grievances or the request to file grievances on the part of the Plaintiff." Petitioner claims that there was no union and that the union was simply a fiction created by the employer. The fraud precipitated upon the Petitioner arises from the whole "scheme" of A.G.A. to quiet the ranks of

dissension by a "token" union. The Complaint was not artfully plead but only made reference to the Collective Bargaining as a "collage" of the misrepresentation practiced upon Petitioner and not dealing with the substantive terms of said Collective Bargaining Agreement. The Collective Bargaining Agreement in short was an artifice foisted upon innocent employees of A.G.A.

The State of California has regulatory provisions to prevent deception and fraud practices upon its citizens. There is direct legislative declaration that interference by an employer in the Collective Bargaining processes of its employees is contrary to public policy of the State. The public policy of the State of California is to permit full freedom of association, self-organization and designation of

representatives of the employees own choosing, to negotiate the terms and conditions of his employment and to be free from interference, restraint, or coercion of employers of labor or their agents. See Labor Code, Section 923. It has been held that an apparent unity of interests between an employee's association and an employer tends to negative any inference of a bona fide and independent bargaining association. It has been held that an employer who notifies his employees that he has agreed with the union, which is, and which he knows to be, unauthorized and unwanted by his employees, requiring them to join such union, and be represented by it or be dismissed from employment, constitutes an unlawful interference by the employer. See Chavez v. Sargent 52 C. 2d 162. The State has a compelling interest to protect its employees from interference

in the bargaining process by the employer. That situation arose in the FRANCO case and constitutes significant interference, domination and coercion by A.G.A. Other case authorities support the State's compelling interest in this regard. Fraud and deceit have been protected under California Civil Code Sections 1709, 1710, and 1711. McKay v. Retail Auto Salesmens's Local Union (1940), 16 C. 2d 311. Furthermore, the state claim can be resolved without interpreting the Collective Bargaining Agreement as enunciated in Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399 (1988). It has been held that the improper use of a fictional union and Collective Bargaining Agreement violates State law. Scott v. New United Motor Manufacturing Inc. (1986), 632 F. Supp. 891. It was therefore error for the District Court to find that there was a

preemption of the State claims under Federal Law applying the rationale of Allis-Chalmers Corp. v. Lueck (1984), 471 U.S. 213.

4. THE NATIONAL LABOR RELATIONS BOARD DOES NOT HAVE EXCLUSIVE JURISDICTION OVER THE PROSECUTION OF UNFAIR LABOR PRACTICE AS ALLEGED IN THE FOURTH COUNT OF THE FIRST ACTION

It has been held that the District Court has the right to exercise jurisdiction over, and need not defer the case to the National Labor Relations Board, concerning labor disputes involving suits under Section 301 of the NLRA for violations of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in the National Labor Relations Act, or of contracts between such labor

organizations. By statute, the Federal District Court is not preempted to hear suits for violations of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in the N.L.R.A. for suits under Section 301 of the National Labor Relations Act, even if they embrace an unfair labor practice charge.

The Cement Mason Health and Welfare, etc. v. Kirkwood-Bly (1981), 520 F. Supp. 942, case specifically reiterates the rule. It has been held that the N.L.R.B. and Courts have concurrent jurisdiction under 29 U.S.C. Section 185(a) where labor dispute involves both breach of contract and unfair labor practices. Hotel and Restaurant Employees, Local 703 v. Williams (1985), 752 F.2d 1476. Thus, it was error for the Court to conclude that

the Unfair Labor Practice claim was within the exclusive province of the National Labor Relations Board, when case and statutory authority are to the contrary.

5. PETITIONER EXHAUSTED HER ADMINISTRATIVE REMEDIES UNDER THE AGA RETIREMENT INCOME PLAN.

The A.G.A Retirement Income Plan does not specify any kind of administrative hearing procedures that has to be exhausted before instituting an action. At page 11 of the Plan, it states, "If you have a claim for benefits which is denied or ignored, in whole or in part, you may file suit in a state or federal court." There can be no equivocation that the plan, under which Petitioner was governed, states that she may file suit if in fact her claim for benefits is denied or ignored. It is

undisputed that she sent a letter on December 30, 1986 to Union and Employer and that her claims were largely ignored. Within six months thereafter, she filed her complaint which is the basis of the breach of fiduciary duty under ERISA. Petitioner has in fact exhausted all administrative remedies before bringing this action. The issue in Amato v. Bernard (1980), 618 F.2d 559, dealt with an employee who did not exhaust the administrative procedures set forth in the pension plan before seeking judicial relief. The substance of the language of 29 U.S.C., Section 1133 was not incorporated into the pension plan and left the participant, namely FRANCO, with the impression that if a claim for certain benefits was made to the employer and to the Union and such claims were largely ignored, she could then proceed directly into Court, having then

exhausted her administrative remedies under the pension plan. FRANCO has exhausted such administrative remedies, and there was a triable issue of fact.

6. PETITIONER'S ERISA CLAIM AGAINST AMERICAN GAS ASSOCIATION IS NOT BARRED BECAUSE A.G.A. IS SO INTRICATELY INVOLVED IN THE ADMINISTRATION OF THE PLAN AND CONTROLS THE PLAN.

A.G.A Retirement Income Plan, as attached as Exhibit "A" to the First Amended Complaint, set forth serious representations concerning AMERICAN GAS ASSOCIATION'S involvement with the plan. A review of Exhibit "A" does not mention that it is a plan summary as required by ERISA, but has boldly printed on the cover of the booklet "American Gas Association Retirement Income Plan". It is self-evident that participants and beneficiaries would rely on Exhibit "A"

as expressing the very essence of the Plan.

At Paragraph 12.20 (a) of the Retirement Income Plan, there is a designation of the fiduciaries and their responsibilities under the Plan. In Section C of that Paragraph a committee of the employer plays an active role in the management of the plan through investment managers selected by the employer. As that passage specifically reads:

> "The Board Finance Committee of the Employer may in its discretion appoint one or more investment managers to manage any or all assets of the Plan, and to the extent such managers are appointed, the investment managers shall be the named fiduciaries with respect to control or management of the

Plan assets. Upon appointment of any such investment managers, the trustee shall be subject to the proper directions of such investment managers."

It is quite evident that the Employer selects the members to sit on the Board Finance Committee and that the Board Finance Committee has the authority in the appointment of investment managers to manage all assets of the plan and that the trustees are subject to the proper direction of such investment managers. 29 U.S.C. Section 1002 defines an employer to be "any person acting directly as an employer or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting from an employer in such capacity." Exhibit "A" establishes that

AMERICAN GAS ASSOCIATION and AMERICAN GAS ASSOCIATION LABORATORIES, PACIFIC COAST BRANCH control the plan through its investment managers and its Board Finance Committee. Exhibit "A" shows that officers of A.G.A. are members of the Retirement Committee and, in the absence of countervailing evidence presented by AMERICAN GAS ASSOCIATION, officers and directors of A.G.A. still occupy positions as members of the retirement committee. It should also be pointed out that Retirement Committee consists exclusively of officers and directors of AMERICAN GAS ASSOCIATION. It has been held that where an employer controls the plan or is involved in its administration, he can be subject to the mandates of Title 29, U.S.C. Sections 1132, 1140 and 1109 of the Employee Retirement Income Security Act. Boyer v. J.A. Majors Company Employee's Profit

Sharing Plan (1979), 481 F. Supp. 454. One of the legislation's critical elements was the uniform regulation of fiduciary conduct and, as enacted, ERISA set out specific standards of conduct for fiduciaries. See 29 U.S.C. Sections 1104, 1106, and 1109; 29 U.S.C. Section 1002(21)(A).

ERISA'S legislative history reveals that Congress sought to codify the principles of fiduciary responsibility as they had developed in the law of trusts. The House Conference Report, H.R. Report 1280, 93rd Congress, 2d Session, states that "the definition of fiduciary includes persons who have authority and responsiblity with respect to the management of a plan, disposition of its assets, or administration of the plan, regardless of their formal title." 1974 U.S. Code Cong. & Ad. News 5103. Judicial interpretations have been

consistent with Congressional intent. The Courts have examined the role that a person plays in the management or administration and have assessed the extent of discretionary authority, all without undue reference to formal titles. See Amato v. Western Union International, Inc. 773 F.2d 1402, 1416-17. An employer will be considered a fiduciary when it functions as a plan administrator. A corporate executive will be deemed a fiduciary of a company-run ERISA Plan though he was not named as a fiduciary. Anderson v. Ciba-Geigy Corporation, 759 F.2d 1518, 1522. Corporate officers who are also trustees of the firm's Pension Plan are fiduciaries within the meaning of ERISA. Donovan v. Bierwith, 680 F.2d 263, 271-72. The courts and commentators agree that certain positions, such as trustee or plan administrator, inherently require fiduciary responsibilities.

Robbins v. First American Bank of Virginia, 514 F. Supp. 1183, 1189. Under the facts of the FRANCO case, AMERICAN GAS ASSOCIATION and AMERICAN GAS ASSOCIATION LABORATORIES, PACIFIC COAST BRANCH share the power, through its Board Finance Committee, to appoint investment managers who manage the assets of the Plan. These investment managers are the named fiduciaries with respect to the control or management of Plan Assets and have authority to control trustees of the Plan. It is patently evident that the A.G.A. controls and manages the Plan and is a fiduciary under the definition of 29 U.S.C. Section 1002(21)(A). The powers and authority A.G.A. can exert under the A.G.A Retirement Income Plan is not ministerial in nature, but embraces all aspects of management and control of the Plan.

The District Court found

Gelardi v. Pertec Computer Corporation case (9th Cir., 1985), 761 F.2d 1323, applicable to this case. Gelardi is, contrary to the decision of the Court, not applicable. In Gelardi, there was an outside administrator, whereas in this particular case A.G.A. controls the retirement committee, the Board of Finance Committee and the investment managers. The A.G.A. Retirement Committee consists of officers and directors of the AMERICAN GAS ASSOCIATION. The Court is not compelled to observe the fiction of the Plan's designated fiduciary, but can go behind the Plan to determine who has actual control and/or management over the Plan and its assets. Whether or not an individual or entity is an ERISA fiduciary must be determined by focusing on the function performed, rather than on the title held. Amato v. Westen Union

International, 773 F. 2d, 1402, 1416-17. Anderson v. Ciba-Geigy Corp, 259 F. 2d, 1518, 1522 (11th Cir.) An entity need not have absolute discretion with respect to a benefit plan in order to be considered a fiduciary. Sixty-Five Security Plan v. Blue Cross and Blue Shield, 583 F. Supp. 380, 386-387. A recent case decision found employers were ERISA fiduciaries when they exercised actual control over the disposition of plan assets. U.S. v. Ramirez-Amaya (1987, 2nd. Cir.), 812 F. 2d 810, 813.

7. IT WAS ERROR FOR THE DISTRICT COURT TO DISMISS PENDENT CLAIMS AFTER SUGGESTING THEIR FILING IN STATE COURTS

Remand is proper when it has been determined that a cause was removed improvidently and without jurisdiction. 28 U.S.C., Section 1447(c). The denial of a Motion to Remand an Action to State

Court for want of removal jurisdiction is subject to de novo review. Williams v. Caterpillar Tractor Co., 786 F. 2d 928, 930 (9th Cir. 1986). The original action entitled Mary Franco v. American Gas Association Laboratories, Pacific Coast Branch; American Gas Association Employees' Union of the American Gas Association Laboratories, Pacific Coast Branch was filed on May 11, 1988, Case No. 87 03032. A.G.A. served upon FRANCO its Motion to Dismiss or, in the Alternative, Motion for Summary Judgment. The Motion was continued from August 31, 1987 to October 5, 1987. On October 5, 1987, the Court determined that several of the Counts were to be dismissed as time barred. As to Count 3 and Count 6 of that Complaint, the Court determined that these claims were state claims that were only tied to the Federal District Court through pendent jurisdiction.

Court granted FRANCO leave to amend the Complaint and cautioned Counsel that FRANCO would have to show as to why the Court should have subject matter jurisdiction over Counts 3 and 6, stating in essence that these matters should be resolved in the State Courts, not the Federal District Court. FRANCO filed her First Amended Complaint omitting Counts 3 and 6, and then filed her Superior Court case alleging those State claims.

It has been held that it removal is found to have been improvidently granted, remand is mandatory and the Court lacks jurisdiction. Brooks v. Rosiere (1984), 585 F. Supp. 351.

The Court has determined that Count 3 and Count 6 of the original Complaint are State claims. FRANCO elected not to amend the Complaint or to show cause why Count 3 and Count 6 are

within the Federal jurisdiction, and filed those state claims in the Superior Court of the State of California. A.G.A. has wrongfully removed the case from the Federal District Court in an attempt to characterize the Complaint as artful pleading involving a Federal question. The Court has determined that these two counts are outside the realm Federal jurisdiction, except by way of Federal pendent jurisdiction. A.G.A is now collaterally estopped from removing the action from the Federal District Court. FRANCO has relied upon the previous ruling of the Court to her peril. It was improper for the District Court not to remand the actions and then grant Summary Judgment as to them.

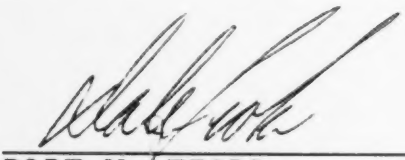
8. IT WAS ERROR FOR THE REVIEWING COURT TO AFFIRM THE ORDER OF DISTRICT COURT ON GRANTING SUMMARY JUDGMENT.

Based on the foregoing facts and law, the reviewing Court erred in affirming Order granting Summary Judgment.

CONCLUSION

The Court should grant Writ of Certiorari.

DATED: August 10, 1990



DALE M. FIOLA
Attorney for Petitioner FRANCO

APPENDIX A

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MARY FRANCO, Plaintiff, vs. AMERICAN GAS ASSOCIATION LABORATORIES, PACIFIC COAST BRANCH; AMERICAN GAS ASSOCIATION EMPLOYEES' UNION OF THE AMERICAN GAS ASSOCIATION LABORATORIES, PACIFIC COAST BRANCH; and AMERICAN GAS ASSOCIATION RETIREMENT COMM. Defendants.	)	NO. CV-87-3032-PAR **RULING**

Grant Motion for Summary Judgment in part: The six month statute of limitations of Section 301 is not tolled for all counts brought pursuant to it. Section 301 preempts Count 5. Count 4 is not under the exclusive jurisdiction of the NLRB. Petitioner does not need to exhaust her remedies under the ERISA plan. However the Court is inclined to stay the ERISA action pending submission or requested information; if it does so, ruling should also be deferred on the validity of compensatory or punitive damages under ERISA. Sanctions are not appropriate. The evidentiary objections are moot.

Petitioner brings this action pursuant to 29 U.S.C. Section 185 (Section 301 of the Labor Management Relations Act) and 29 U.S.C. Sections 1109 and 1132(a) (ERISA); the seven counts in Petitioner's Complaint

essentially allege the breach of fiduciary duties imposed by the above statutes. Respondent AMERICAN GAS ASSOCIATION moves for Summary Judgment on the ground that Petitioner's claims are time barred under Section 301 and that she has failed to exhaust her administrative remedies.

MATERIAL FACTS NOT GENUINELY IN DISPUTE

1. Petitioner MARY FRANCO was employed by Respondent AMERICAN GAS ASSOCIATION for thirty-three years; her last day of work was on February 9, 1984; on this day she fell off a stool and hit her head. She was also a member of Respondent AMERICAN GAS ASSOCIATION Employees Union. (Petitioner's Declaration of MARY FRANCO Sections 2, 3, 6).

2. Petitioner was terminated by Respondent AGA on or about June 30, 1984. (Petitioner's Declaration of MARY FRANCO Section 2).

3. Petitioner started receiving retirement pay on April 1, 1985. (Petitioner's Declaration of Dale Fiola, Exhibit B).

4. Petitioner by letter requested the Company to recalculate her retirement, sick pay, and vacation benefits on December 30, 1986. (Petitioner's Declaration of Dale Fiola, Exhibit F).

5. Respondent AGA responded to Petitioner's December 30, 1986 letter on January 15, 1987. This letter explained AGA's position that its calculation of benefits was correct. (Respondent's Declaration of Kevin Belford, Exhibit 12).

6. Petitioner sent another letter to AGA on April 15, 1987; it stated that Petitioner had not heard from the Union and that AGA's response was not satisfactory. (Petitioner's Declaration of Dale Fiola, Exhibit H).

7. Respondent AGA sent one last letter to Petitioner on April 24, 1987; it requested certain information from Petitioner for use in evaluating her claim and stated the company's willingness to recalculate her benefits if it had made a mistake. (Respondent's Declaration of Kevin Belford, Exhibit 15).

8. Petitioner by letter requested the Union to file a grievance on Petitioner's behalf about her benefits on December 30, 1987. (Petitioner's Declaration of Dale Fiola, Exhibit D).

9. The Union did not respond to this request and on April 30, 1987, Petitoner's counsel telephoned the Union to inquire about MRS. FRANCO'S grievance. He was informed that the Union was "quite informal" and that a company official usually handled grievances. (Petitioner's Declaration of Dale Fiola,

Section 8).

10. The ERISA plan summary does not contain a description of a formal claims and appeal procedure. (Petitioner's Declaration of Dale Fiola, Exhibit G).

POSSIBLY DISPUTED FACTS THAT ARE NOT MATERIAL

1. The scope of the prior attorneys' work for Petitioner. Because the Court does not reach the issue whether the retainer of counsel by Petitioner negates any tolling, this issue is not material.

2. The extent of Petitioner's mental impairment. Because the Court will not toll the statute, this issue is not material.

STANDARD

Fed. R. Civ. P. 56(b) provides that a defending party may move for Summary Judgment if the pleadings and supporting material "show that there is

no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Summary Judgment in favor of the Respondent is therefore appropriate if Petitioner fails to: 1) produce evidence to support the existence of all essential elements on which Petitioner bears the burden of proof; and 2) show that all disputes about material facts or necessary inferences from the facts could reasonably be resolved in favor of either party by the trier of fact. See, California Architectural Building Products, Inc. v. Franciscan Ceramics, Inc., No. 86-5822, slip op., at 5-6 (9th Cir. June 4, 1987); Celotex Corp. v. Catrett, ____U.S. _____, 106 S. Ct. 2505, 2511 (1986). See generally, Schwarzer, Summary Judgment and Case Mangement, 56 Antitrust Law Journal 213, 218 ("undisputed evidence submitted by a

Petitioner may be insufficient to sustain a verdict which turns on a mixed question of law and fact under the applicable substantive law").

Respondent contends that Summary Judgment is proper because of Petitioner's failure to meet the statute of limitations, exhaust her administrative remedies, and bring her claims in the proper forum.

SECTION 301 STATUTE OF LIMITATIONS

The gravamen of Petitioner's Complaint is that she was unfairly and fraudulently discharged from her job and denied her rightful employment benefits by the Respondents. Her termination occurred in June of 1984 and she began to receive retirement benefits on April 1, 1985. Petitioner apparently does not explicitly contend that the wrongful acts by the Respondents that injured Petitioner occurred after April 1, 1985.

Rather, Petitioner focuses her argument on the theory that any applicable statute of limitations should be tolled until December 30, 1986.

a. Mental Disability

In Del Costello v. Teamsters, 462 U.S. 151, 76 L.Ed.2d 476, 103 S. Ct. 2281, (1983) the Supreme Court "borrowed" a six month statute of limitations from the National Labor Relations Act to apply to actions under Section 301 of the Labor Management Relations Act. Respondent contends that all of Petitioner's counts brought under Section 301 should therefore be time-barred. In response, Petitioner contends that her mental incapacity should toll the statute of limitations. Specifically, Petitioner urges the Court to apply California Code of Civil Procedure Section 3, Section 352(a)(2) to her action. This California provision tolls a statute of

limitation while a party is insane or mentally deranged.

Although it is the usual practice of the Federal Courts to "borrow" state statutes of limitation from analogous causes of action when a federal statute lacks a statute, California Section 352(a)(b) cannot apply directly in the instant case. Even when the Federal Courts have borrowed state statutes of limitation, they still often apply federal law on the tolling of these statutes. See, e.g., Richards v. Mileski, 662 F.2d 65 (D.C. Cir. 1981). Borrowing the state tolling provision would be particularly inappropriate here because the six month statute of limitations was borrowed from another federal statute rather than from a state law; the natural implication of this decision is that federal law should apply to the tolling issue as well. Harris v.

Ford Motor Company, 635 F.Supp. 1472 (E.D. Mo. 1986).

The standard federal rule on the tolling of a statute of limitations is that mental disability is not a valid reason to toll a statute. See DeArnaud v. United States, 151 U.S. 483, 14 S.Ct. 374, 38 L.Ed. 244 (1894); Casias v. United States, 532 F.2d 1339 (10th Cir. 1976); Accardi v. United States, 435 F.2d 1239, 1241 n. 2 (3rd Cir. 1970); Harris v. Ford Motor Company, supra; O'Hara v. Kovens, 473 F.Supp. 1161, 1167 (D. Md. 1979), aff'd 625 F.2d 15 (4th Cir. 1980), cert. denied, 449 U.S. 1124, 67 L.Ed.2d 109 (1981). Harris, supra, is directly on point.

Yet none of these cases is binding on this Court and in fashioning equitable federal common law the Courts traditionally have shown great flexibility. See, Mishkin, The

Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision, 105 U.Pa.L.Rev. 797, 804-810 (1957). Thus in Basset v. Sterling Drug, Inc., 578 F.Supp. 1244 (S.D. Ohio 1984) the Court refused to follow the standard federal rule on tolling for mental incapacity because it would frustrate the "remedial and humanitarian" purposes of the Age Discrimination in Employment Act. Furthermore, the Court also noted that under federal law ignorance of the filing requirement--arguable a less persuasive reason to toll than mental incapacity--will often toll a statute of limitations.

The Court in Harris v. Ford Motor Company, supra, however, rejected this reasoning in a situation quite similar to the instant case. The Harris Court held that the application of

"federal equitable tolling principles in this case would be inconsistent with the policies which the Del Costello decision is based." Id. at 1474. The primary policy that influenced the Harris Court was the Court's goal of encouraging the rapid and final resolution of labor disputes. Id. Another policy present in Del Costello, supra at 462 U.S. at 162, 76 L.Ed. 487. Any tolling of the six month statute of limitations will obviously blur the uniformity of Section 301 as different Courts interpret the equities for and against tolling in different ways.

A final reason for not tolling the statute lies in the language of the provision. In Del Costello the Court borrowed the statute of limitations found in 29 U.S.C. Section 160(b) (National Labor Relations Act) to apply to actions under Section 301. The Labor Act's

statute does explicitly set out one reason to toll: service in the armed forces. Although there is nothing in 29 U.S.C. Section 160(b) that says other conditions could not also toll the statute, the presence of one explicit tolling condition does suggest that Congress at least considered the issue in general and did not find other reasons for tolling to be as compelling.

I recognize that in Del Costello the Court remanded the case to the District Court for it to consider whether any equitable reasons existed to toll the newly borrowed statute of limitations. Id. at 462 U.S. 172, 76 L.Ed.2d 494. The Supreme Court thus obviously did not feel that the need for prompt resolution of labor disputes and uniformity in the nation's federal labor law protected the six month statute of limitations from all exceptions. The

tolling exception, however, that was actually before the District Court was the "fraud" exception, Del Costello v. Teamsters, 524 F.Supp. 721, 725 (D. Mld 1981); this exception has long been recognized by the Federal Courts. Its application, therefore, to Section 301 is far less problematic.

Although Petitioner's position is sympathetic, the weight of authority and the Congressional policies embodied in Section 301, particularly in contrast to the more expansive policies contained in the Age Discrimination Act, determine that this Court should not extend federal common law to toll the statute because of Petitioner's unfortunate mental impairment. This conclusion is bolstered by the inability of such an extension to help Petitioner in any event. Even if mental incapacity were to toll the statute, this Court would wish to employ

a simple test for whether the impairment would be sufficient to toll the statute. For example, the Court in Bassett adopted a rule that tolled a statute of limitations upon adjudication of incompetence or institutionalization. Bassett, supra, at 578 F.Supp. 1248. This Court would adopt a similar rule for similar reasons and even this extension of federal common law would not save Petitioner's claims in this case.

The Court thus declines to borrow California Code of Civil Procedure Section 352(a) for causes of action under Section 301. Furthermore, the Court also declines to extend federal common law to toll the statute of limitations. The Petitioner's alleged mental incapacity therefore does not toll the statute.

b. Fraud Exception

Unlike mental incapacity, fraud has long been recognized by the federal

Courts as a condition that will toll a statute of limitations. If a Petitioner is injured by fraud and the Respondent successfully conceals the fraud from the Petitioner then the statute will not begin to run until the fraud is discovered. Holmberg v. Armbrecht, 327 U.S. 392, 397, 90 L.Ed. 743, 66 S.Ct. 582 (1946). This fraud exception applied to the six month statute of limitations contained in 29 U.S.C. Section 160(b) that governs this action. Stallcop v. Kaiser Foundation Hospitals, 820 F.2d 1044 (9th Cir. 1987).

Petitioner alleges fraud in that Respondents concealed from Petitioner the Union's real status as an alter-ego of the company. (Petitioner's Declaration of Mr. Fiola, Section 8). The evidence brought by Petitioner does successfully establish a prima facie case that the Union was not independent of the

company. Petitioner fails, however, to explain how this alleged fraud was responsible for her failure to file a timely claim. According to the record, Petitioner did not contact the Union to investigate her claims until December 30, 1987. (Petitioner's Exhibit D). Unless without waiting for a request, than its inaction does not constitute fraud. See, Stallcop, supra, at 1050 (no equitable tolling absent duty by Respondent to inform Petitioner of six month statute of limitations); Sevako v. Anchor Motor Freight, Inc., 792 F.2d 570, 575-76 (6th Cic. 1986) (nondisclosure of unrequested documents does not toll statute in hybrid Section 301 case). The mere fact that the Union was "kept" by the company cannot by itself toll the statute; every hybrid Section 301 claim--by definition--involves in some fashion a delinquent Union and the statute would

automatically be tolled in every case if this delinquency constituted statute tolling fraud. Because Petitioner apparently did not involve the Union in her benefit dispute until after the statute had run, and because Petitioner does not substantiate how the "depravity" of a kept Union inflicted continuing harm on her, the Respondents' alleged fraud in concealing from Petitioner the dependence of the Union on the company cannot toll the statute.

c. Retainer of Counsel

Respondent asserts that even if mental incapacity could toll the statute, the Petitioner's retainer of counsel would start the statute running again. Petitioner argues, however, that Petitioner's earlier attorneys were not hired to resolve the specifics disputed that are the basis of the present law suit. Because the Court has found that

there is no basis for tolling the statute, this question is moot. The Court does note, however, in Stallcop v. Kaiser Foundation Hospitals 820 F.2d 1044, 1050 (9th Cir. 1987) the Ninth Circuit ruled that consulting an attorney provided a "means to knowledge" that would prevent the tolling of any statute of limitations. Although the earlier attorneys were ostensibly retained to investigate the Plaintiff's rights under different legal theories, the parties and "operative facts" underlying the retainer of the three attorneys was the same. Given this similarity, it is likely that Petitioner acquired the "means to knowledge" that she must file any claim under the collective bargaining agreement within six months.

EXCLUSIVE JURISDICTION UNDER NLRA

Count four of Petitioner's Complaint charges that the Respondents'

creation of a straw Union violates the National Labor Relations Act. Respondent interprets this claim as one pursuant to Section 8(a)(12) of the National Labor Relations Act (29 U.S.C. Section 158(a)(2)). The NLRB has exclusive jurisdiction to hear claims under this section. San Diego Building Trades Council v. Garmon, 359 U.S. 236, 7 L.Ed. 775, 79 X.Ct. 773 (1959).

Petitioner, however, contends that count four is brought pursuant to Section 301 of the Labor Management Relations Act. Altough the language in count four certainly sounds like a Section 8 claim, the Court is willing to accept Petitioner's characterization of her own Complaint. Like the other Section 301 claims, therefore, count four is barred by the statute of limitations.

EXHAUSTION OF REMEDIES UNDER ERISA

Count seven of the Complaint

alleges a violation of Section 1109 based on Respondents' breach of fiduciary duty through failing to disperse her complete retirement pension benefits. Under current Ninth Circuit law a participant in an ERISA plan must exhaust his or her internal review procedures under the plan before the participant can bring an action for the benefits in Federal Court under 29 U.S.C. Section 1132. Amato v. Bernard, 618 F.2d 559, 566-68 (1980). A plan must provide a full and fair review of a decision to deny a participant's claim for benefits. 29 U.S.C. Section 1133.

The secretary of Labor has issued regulations specifying the requirements that a review procedure must meet under 29 U.S.C. Section 1133. 29 C.F.R. Section 2560.503-1. Regulation 2560.503-1(e) requires the employer to notify the participant of its decision on

the participant's claim within 90 days. Petitioner's counsel's letter of December 30, 1986, adequately brings notice to the employer of the claim (Petitioner's Exhibit D), and Respondent's letter of January 15, 1987, notified the Petitioner of its decision (Respondent's Exhibit 12).

Regulation 2560.503-1(g) requires each plan "to establish and maintain a procedure by which a claimant or his duly authorized representative has a reasonable opportunity to appeal a denied claim..." Although Respondent has commendably informed Petitioner that it remains ready to answer all questions she may have about her benefits and will promptly rectify any error it has made (Respondent's Exhibit 15), neither Respondent's letters nor its ERISA plan (Petitioner's Exhibit G) explicitly outlines the formal review procedure

envisioned in 29 U.S.C. Section 1133 and supplementing regulation 2560.503-1(g). The present case differs therefore from Amato v. Bernard, supra at 618 F.2d 565, in which the plan contained specific provisions that notified the plan participants of the steps they should take if a benefit dispute arose. Because the plan does not outline an explicit review procedure, it is inappropriate to apply the exhaustion to remedies doctrine and dismiss Petitioner's claim. To hold otherwise would force both Courts and potential Petitioner's continually to guess whether ad hoc responses by employers had exhausted a participant's remedies under the plan.

Nonetheless, this Court has the power to stay a statutory claim while administrative proceedings are still underway. Amaro v. Continental Can Co., 724 F.2d 747, 752 (1984). While not

sufficient to dismiss the ERISA count, the Court does accept as true Respondents' statements that it will fully review Petitioner's claims for benefit adjustment once it has received the necessary information from the Petitioner to evaluate the claims. The Court therefore stays count seven of the Complaint for 60 days to allow Petitioner 30 days to submit the information requested by Respondent and to allow Respondent 30 days following the receipt of the necessary information to review it and take whatever action it deems appropriate, consistent with the procedures and standards mandated by regulation 2560.503-1(g) & (h). A status conference by telephone shall be set

_____.

PREEMPTIVE EFFECT OF SECTION 301

Respondent contends that counts three, five, and six, are preempted by

Section 301 and that under the "artful pleading" doctrine they should be recharacterized as Section 301 claims. Supporting this view is Petitioner's failure in the Complaint to assert another basis of jurisdiction for these claims.

Nonetheless, Petitioner apparently believes that at least counts three and six are independent common law claims. The only possible basis for federal jurisdiction in this case is pendent jurisdiction; perhaps the Petitioner makes this claim. (Petitioner's Opposition p. 24). While Stallcop v. Kaiser, 820 F.2d 1044, 1048 (9th Cir. 1987) strongly suggests that these claims are preempted by Section 301, the Court is willing for purposes of this Motion to assume that these counts are valid pendent claims. Consequently. they are dismissed with leave to amend

for failure to comply with Local Rule 3.7.1. If Petitioner does choose to refile these claims, she should be prepare to show cause why they should not be dismissed under the Court's discretionary power to dismiss pendent claims.

The Court interprets Petitioner's Opposition as characterizing count five as a Section 301 claim. (Petitioner's Opposition, pp. 26-27). Therefore, count five is barred by Section 301's six month statute of limitations.

EXHAUSTION OF REMEDIES UNDER THE COLLECTIVE BARGAINING AGREEMENT

Respondent contends that Petitioner's first count is barred because she has not utilized the grievance procedure provided for in the collective bargaining agreement. Given the ruling that this claim is barred by

the statute of limitations, this argument is moot.

SANCTIONS

Respondent requests sanctions under Fed. R. Civ. P. 11 on the basis that Petitioner's counsel should have been aware that the statute of limitations had run and that no equitable tolling was possible. However, Rule 11 is not designed to chill zealous advocacy and Petitioner's contentions were not patently erroneous or factually unsupported. Similar reasoning applies to Respondent's Motion for Sanctions under Fed. R. Civ. P. 56(g).

CONCLUSION

Respondent's Motion for Summary Judgment on counts one, two, four, and five is granted. Counts three and six are also dismissed, but with leave to amend. The Court stays count seven for the interval mentioned in this memo. No

sanctions are awarded.

ENDNOTES

1. Federal cases cited by Petitioner in support of equitable tolling (Supplemental Opposition p. 2) are not binding and address the statute of limitations in civil rights cases, not in cases under Section 301.

2. DeArnaud v. United States, supra, is distinguishable in that it involved a claim against the United States. Waivers of sovereign immunity traditionally are strictly constructed so any equitable tolling would not apply in that case. See Basset, infra, at 1246.

3. The Court in Harris, however, distinguished between breaches of the duty of fair representation and the collective bargaining agreement and claims for wrongful denial of pension benefits. Id. at 1474. It left open the

question whether the statute of limitations should be tolled on the pension claims. Yet the Harris Court does not explicitly state any reasons why pension claims should receive different treatment and this Court finds that the arguments against tolling apply with sufficient force to this type of claim as well.

4. The Ninth Circuit has carved out a limited exception to this rule for violations of 29 U.S.C. Section 1140. Amaro v. Continental Can Co., 724 F.2d 747 (1984).

5. Regulation 2560.503-1(b) permits the claims procedure to be outlined in the collective bargaining agreement instead of the plan. Neither party, however, has placed in the record a provision of the collective bargaining agreement that contains an explanation of Respondent's procedure for reviewing benefit claims.

DATED: October 5, 1987

PAMELA ANN RYMER
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MARY FRANCO, Plaintiff, vs. AMERICAN GAS ASSOCIATION LABORATORIES, PACIFIC COAST BRANCH; AMERICAN GAS ASSOCIATION EMPLOYEES' UNION OF THE AMERICAN GAS ASSOCIATION LABORATORIES, PACIFIC COAST BRANCH; and AMERICAN GAS ASSOCIATION RETIREMENT COMM. Defendants.	CV-87-3032-PAR CV-88-1485-PAR **MEMORANDUM OF DECISION AND ORDER**

On May 11, 1987 Plaintiff filed her original Complaint in this action; it alleged seven counts under the Labor Management Relations Act and the Employee Retirement Income Act (ERISA), 29 U.S.C. Section 1109 and 1132(a). The claims arise out of a dispute over the proper level of retirement and disability benefits that Plaintiff should receive. Plaintiff was employed by Defendant AMERICAN GAS ASSOCIATION for thirty-three years, her last day of work was on February 9, 1984. She was terminated by AGA on June 30, 1984 and started receiving retirement pay and other benefits on December 30, 1987. The Court granted partial Summary Judgment to Defendants on October 5, 1987. The claims under the Labor Act were dismissed and the claims under ERISA were stayed pending administrative review of Plaintiff's benefits level. The Court

also granted Plaintiff leave to amend her Complaint.

At a Status Conference on January 14, 1988 the parties reported that the administrative review was complete and that they still differed widely over the amount of additional benefits that Plaintiff should receive. Meanwhile, Plaintiff filed a First Amended Complaint that realleged ERISA claims under 29 U.S.C. Sections 1109 and 1132(a)(2); Plaintiff claims that Defendants have breached the fiduciary duties on them by ERISA. Defendant AMERICAN GAS ASSOCIATION now moves for Summary Judgment on Count One of the First Amended Complaint.

Plaintiff also filed a Complaint in Los Angeles Superior Court State Court alleging, inter alia, two of the claims that were dismissed in the original Federal Complaint for failure to

satisfy Local Rule 3.7.1. The Court accepted, for purposes of that Motion, Plaintiff's characterization of the counts as pendent common law claims and they were dismissed. Defendants subsequently removed the state action to Federal Court. Plaintiff now moves for remand of these claims to State Court; Defendant moves to dismiss the entire Complaint. There are sundry requests for sanctions.

MATERIAL FACTS NOT GENUINELY DISPUTED

1. Plaintiff is a beneficiary of the Retirement Plan established by her former employer, Defendant AMERICAN GAS ASSOCIATION.

2. Under the terms of the Plan, Defendant is the "Employer". Hargest Declaration Exhibit 1, Paragraph 1.15 (hereinafter "Plan").

3. Under the terms of the

Plan, the AMERICAN GAS ASSOCIATION Retirement Committee is the "Plan Administrator". Plan, Paragraph 1.27.

4. The Plan designates the President of the AMERICAN GAS ASSOCIATION as chairman of the Retirement Committee. The other members of the Committee are appointed by the Board of Directors of AGA and serve at its pleasure. If less than three members of the committee are in office, then the Board serves as the Retirement Committee. Paragraph 12.2(a). All five members of the Retirement Committee in 1976 were employees of AGA.

5. According to the Plan, the Retirement Committee determines the payment of benefits and hears appeals of denied claims. Plan, Paragraph 12.(a)(2) & (3).

6. The Trustee is the fiduciary responsible for the Plan assets. Plan Paragraph 12.20(a)(1)(A).

The current trusteee is American Security Bank. Until July, 1984, the trustee was the Bankers Trust Co. Hargest Decl. Paragraph 4.

7. The Investment Manager is the fiduciary that manages the assets of the plan. Plan Paragraph 12.20(1)(1)(C). The Investment Manager is Lazard Freres and Company. Hargest Reply Decl. Paragraph 5. The Investment Manager is appointed by AGA'S Board Finance Committee. Plan, Paragraph 12.20(a)(1)(C).

8. The Plan Actuary is the firm Alexander and Alexander. The Actuary computes the retirement benefits for all retired AGA employees. Hargest Reply Decl. Paragraph 3.

9. The Compensation Committee of the Board "may adopt from time to time tables and interest rates for the actuarial basis of cost calculations,

including mortality tables and interest rates upon which Actuarial Equivalent computations shall be based". Plan, Paragraph 12.18.

10. The Plan provides that, "The Actuary of each named fiduciary shall be exclusive,...." Plan, Paragraph 12.20(b).

POSSIBLY DISPUTED FACTS THAT ARE NOT MATERIAL

1. Whether Plaintiff regarded the plan summary as the actual terms of the plan, or that AGA was a fiduciary under the Plan. FRANCO Decl., Paragraph 8(b). Plaintiff does not explain how her understanding of these issues affects the legal duties that ERISA imposes on AGA.

SUMMARY JUDGMENT

1. Standard.

Fed R. Civ. P. 56(b) provides

that a defending party may move for Summary Judgment if the pleadings and supporting material "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Summary Judgment in favor of the Defendant is therefore appropriate if Plaintiff fails to: 1) produce evidence to support the existence of all essential elements on which Plaintiff bears the burden of proof; and 2) show that all disputes about material facts or necessary inferences from the facts could reasonably be resolved in favor of either party by the trier of fact. See, California Architectural Building Products, Inc. v. Franciscan Ceramics, Inc., 818 F.2d 1466, 1468 (9th Cir. 1987); Celotex Corp. v. Catrett, U.S. 106 S. Ct. 2548, 3552-53 (1986); Anderson v. Liberty Lobby, Inc., U.S. 106 S. Ct.

2505, 2511 (1986). See generally, Schwarzer Summary Judgment and Case Management, 56 Antitrust Law Journal 213, 218 ("undisputed evidence submitted by a plaintiff may be insufficient to sustain a verdict which turns on a mixed question of law and fact under the applicable substantive law").

Defendant moves for Summary Judgment on the breach of fiduciary duty claim on the ground that it is not a fiduciary under the Plan for purposes of liability pursuant to ERISA. Plaintiff argues that Defendant's de facto involvement and control of the Plan renders it a fiduciary. The parties do not appear genuinely to dispute the actual extent of Defendant's involvement in the Plan. Rather, they differ over whether this involvement renders Defendant a fiduciary.

2. Fiduciary Status

Plaintiff essentially bases her argument on the control that Defendant has over the Plan through its ability to appoint and remove that Retirement Committee and the Investment Manager. These entities in turn have power over the trustee. Defendant's inextricable involvement in the Plan through this control thus allegedly renders it a fiduciary. Under ERISA a fiduciary is anyone who: "exercises any discretionary authority or discretionary control respecting management or disposition of its assets...[or] has any discretionary responsibility in the administration of such plan." Gelardi v. Pertec Computer Corp., 761 F.2d 1323, 1325 (9th Cir. 1985) (quoting 29 U.S.C. Section 1002 (21)(A).

In Gelardi the Court upheld Summary Judgment for the Defendant in a situation similar to that in the instant

case. The main difference between the two cases is that the employer in Gelardi (Pertec Computer Corporation) hired a separate corporation, Self Insurance Programs, to administer the plan, Id. employees. Significantly, however, Plaintiff appealed the Plan Administrator's initial denial of her benefits claim. This appeal was heard by the Pertec Employee Benefits Committee because the Plan Administrator had delegated authority to this body to hear appeals. Although this Committee was composed at least in part of Pertec's employees, the Court ruled that this participation did not render Pertec itself a fiduciary:

> "Although employees of Pertec serve on the Employee Benefits Committee and the determining claims, this does not make the employer a

> fiduciary with respect to the Committee's acts. ERISA anticipates that employees will serve on fidicuary committees but the statute imposes liability on the employer himself only when and to the extent that the employer himself exercises the fiduciary responsibility allegedly breached."
>
> Id.

Furthermore, the Plan Administrator in Gelardi also served at the pleasure of the Board of Directors of the employer. Nonetheless, the Court held this power only rendered the Board liable for improper selection of the administrator.

Id.

The differences between the AGA Retirment Committee and the Pertec Employee Benefits Committee appear to be, at best,

slight. AGA'S additional involvement in the plan through its appointment of the Investment Manager is not relevant to this action because its role does not involve the determination of claims. Gelardi is therefore not distinguishable and it controls disposition of the instant case. Accordingly, Defendant's Motion for Summary Judgment is granted.

MOTION TO REMAND

Plaintiff moves to remand the removed action back to State Court. The basis for this Motion is that this Court has already determined that the first two counts of this action are state law claims. Plaintiff draws this conclusion from the Court's ruling on October 2, 1987:

> Nonetheless, Plaintiff apparently believes that at least counts three and

six are independent common law claims. The only possible basis for Federal jurisdiction in this case is pendent jurisdiction; perhaps the Plaintiff makes this claim. [Plaintiff's Opposition p. 24]. While Stallcop v. Kaiser, 820 F.2d 1044, 1048 (9th Cir. 1987) strongly suggests that these claims are preempted by Section 301, the Court is willing for purposes of this Motion to assume that these counts are valid pendent claims. Consequently, they [sic] are dismissed with leave to amend for failure to comply with Local Rule 3.7.1. If Plaintiff does choose to refile these claims, she should be prepared to show cause why they should

not be dismissed under the Court's discretionary power to dismiss pendent claims. The Court's characterization of counts three and six as pendent claims was for purposes of that Motion only. It did not actually reach the merits of the question and the earlier ruling therefore is not a basis for remand. The Motion is denied. Young v. Anthony's Fish Grotto, 830 F.2d 993 (9th Cir. 1987); Scott v. Machinest Automotive Trades Dist. Lodge No. 190 of Northern California, 827 F.2d 589 (9th Cir. 1987).

Motion to Dismiss

A Court should deny a Motion to Dismiss under Rule 12(b)(6) "unless it appears beyond a doubt that the Plaintiff

can prove no set of facts in support of his claim which will entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). A Complaint is sufficient if, with every doubt resolved in Plaintiff's behalf, it states a valid claim for relief. Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738, 740 (1976); Herman v. Valley National Bank, 339 F.2d 564 (9th Cir. 1980). In general, a Court may not refer to matters outside the pleadings. Lodge 1380, Brotherhood of Railway, Airline and Steamship Clerks v. Dennis, 625 F.2d 819, 824-25 (9th Cir. 1980). If is chooses to consider such evidence, it must treat the Motion as one for Summary Judgment. Clipper Express v. Rocky Mountain Motor Tariff Bureau, 690 F.2d 1240 (9th Cir. 1982); Townsend v. Columbia Operations, 667 F.2d 844, 850 (9th Cir. 1982). To consider matters outside the pleadings

without converting the Motion into a Summary Judgment Motion is reversible error. Bonilla v. Oakland Scavenger Co., 697 F.2d 1297, 1301 (9th Cir. 1982). Because the Local Rules for Summary Judgment Motions provide a useful framework for resolving factual disputes and for evaluating factual inferences, this Court will not convert this Motion sua sponte to one for Summary Judgment and will therefore not consider matters outside the pleadings in evaluating the Motion to Dismiss.

Plaintiff's second action, originally filed in Los Angeles Superior Court, consists of five counts. They are: 1) fraud and deceit; 2) breach of fiduciary duty; 3) breach of the covenant of good faith and fair dealing; 4) Intentional Infliction of Emotional Distress; and 5) Negligent Infliction of Emotional Distress. Defendants AGA, AGA

Laboratories, Pacific Coast Branch, and AGA Retirement Income Plan argue that all of these counts are preempted by Section 301 of Labor Management Relations Act, 29 U.S.C. Section 185. They further argue that these claims are therefore barred by the Section 301 statute of limitations.

In Stallcop v. Kaiser Foundation Hospitals, 820 F.2d 1044, 1048 (9th Cir. 1987) the Court ruled that claims for wrongful discharge, fraudulent misrepresentation, and infliction of emotional distress were all preempted by Section 301. It stated, "The preemptive force of Section 301 is so powerful as to displace entirely any state cause of action for violation of a collective bargaining agreement". The touchstone for preemption under Section 301 is whether resolution of the claim requires interpretation of the collective bargaining agreement. Id. The

characterization of the claim under state law is immaterial if the claim does not ultimately derive from a state law source independant of the existence of the agreement. Allis-Chalmers Corporation v. Lueck, 471 U.S. 202, 105 S.Ct. 1904, 85 L.Ed. 206, (1985)(bad faith handling of disability claim preempted).

Plaintiff contends that her case is distinguishable, and that her claims are not preempted by Section 301 because they do not deal with the terms of the agreement or depend on the agreement for their validity. Rather, "these issues do not deal with the terms and conditions of the collective bargaining agreement, but rather to the tortious conduct stemming from the misrepresentation and breach of fiduciary duty arising from the union fallacy and the collective bargaining agreement." Plaintiff's Opposition at 7. Yet Court

cannot discern how Plaintiff can prove fraud or breach of duty or infliction of emotional distress without proving that her rights under the collective bargaining agreement were violated. Plaintiff admits that her claims depend on a finding that "in fact there was no union in place and the collective bargaining agreement in essence was a sham". Id. This type of claim seems to be almost a paradigm example of a hybrid Section 301 case. Because Plaintiff cites no independent source for any of the alleged duties that Defendants owe her, the claims are preempted. Allis-Chalmers, 85 L.Ed.2d 216.

For the reasons explained at length in the Court's October 2, 1987 ruling, any Section 301 claims Plaintiff has are barred by its six month statute of limitations. The Motion to Dismiss is therefore granted. Given this ruling,

the Court does not have to consider the other issues raised in the Motion or the Opposition.

DATED: August 3, 1988

PAMELA ANN RYMER
United States District Judge

ENDNOTES

1. Defendant actually moves to dismiss pursuant to Fed. R. Civ. P. 12(b)(6); the Summary Judgment Motion is in the alternative. Because both submit papers outside the pleadings and fulfilled the requirements of Local Rule 7.14, the Court will treat the Motion as for Summary Judgment.

APPENDIX C

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARY FRANCO, an individual, Plaintiff-Appellant, vs. AMERICAN GAS ASSOCIATION LABORATORIES, PACIFIC COAST BRANCH; AMERICAN GAS ASSOCIATION EMPLOYEES' UNION OF THE AMERICAN GAS ASSOCIATION LABORATORIES, PACIFIC COAST BRANCH; and AMERICAN GAS ASSOCIATION RETIREMENT COMM. Defendants-Appellees.	Nos. 87-6627 88-6419 88-6689 D.C. # CV-87-3032-PAR # CV-88-1485-PAR **MEMORANDUM*** (FILED MAY 14, 1990)

Appeal from the United States
District Court
for the Central District of California
Pamela Ann Rymer, District Judge,
Presiding
Argued and submitted
March 7, 1990
Pasadena, California

Before: HUG, SCHROEDER, and HALL,
Circuit Judges.

MARY FRANCO appeals the district court's grant of summary judgment for AMERICAN GAS ASSOCIATION LABORATORIES (AGA), AGA EMPLOYEES' UNION (UNION), and AGA's RETIREMENT COMMITTEE (AGARC) in her action under ERISA, Section 301 of the Labor Management Relations Act (LMRA), the National Labor Relations Act (NLRA), and pendent state law claims.

FRANCO was employed by AGA from 1951 until after she suffered an injury on February 9, 1984. Subsequent to her injury, FRANCO hired three different attorneys who requested from AGA information concerning FRANCO's

retirement benefits.

On May 11, 1987, FRANCO filed against AGA and the UNION an unfair labor charge with the National Labor Relations Board and filed a suit against AGA, the UNION and AGARC in federal court alleging federal and state pendent claims.

Thereafter, FRANCO also filed state law claims against AGA. These were removed to the federal court and consolidated with the action already in federal court.

The district court granted AGA summary judgment on all of FRANCO's federal and state counts. She appeals.

FRANCO first contests that her state law claims are not preempted by federal labor law. However, FRANCO's breach of contract claim requires an interpretation of the collective bargaining agreement between the UNION and AGA. As such, the claim is preempted by Section 301 of

LMRA, 29 U.S.C. Section 185. See Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985). All of FRANCO's other claims are based upon FRANCO's assertion that the UNION is a fraud. This assertion constitutes an unfair labor practice under Section 8(a)(2) of the NLRA, 29 U.S.C. Section 158(a)(2) and is preempted by that Act. See San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959).

FRANCO next argues that even if her claims are preempted by federal labor law, she is not, as the district court ruled, barred by the statute of limitations. Instead, FRANCO argues that the statute was tolled for her on the basis of mental incapacity.

Even assuming mental incapacity can in some circumstances be a ground for equitable tolling of the statute of limitations, FRANCO's retainer of

attorneys within the statute of limitations period to investigate her rights to employee benefits acted to give her the "means to knowledge" that she must file any claim under the collective bargaining agreement within six months. See Stallcop v. Kaiser Foundation Hospitals, 820 F.2d 1044, 1050 (9th Cir.), cert. denied, 484 U.S. 986 (1987). Therefore, FRANCO may not claim mental infirmity tolled the limitations period. Although FRANCO's previous attorneys were not enlisted to resolve the specific disputes at issue here, their inquiries concerned related claims and the identical facts.

As to FRANCO's complaints that AGA's creation of a straw-union violated the National Labor Relations Act, the NLRB has exclusive jurisdiction of these claims. San Diego Building Trades v. Garmon, 359 U.S. 236 (1959); Cement

Masons Health and Welfare Trust Fund v. Kirkwood-Bly, Inc., 520 F.Supp. 942 (N.D. Cal. 1981), aff'd, 692 F.2d 641 (9th Cir. 1982). Therefore, the district court was correct to dismiss.

FRANCO also contests the district court's finding that she failed to exhaust her administrative remedies and was therefore ineligible to sue under ERISA. Although the ERISA plan is clear that in order to contest the amount of benefits, the employee must notify the retirement benefits committee within 90 days, FRANCO claims the benefit of a summary of the plan sent to her which provided that members whose claims have been denied or ignored may file suit in state or federal court. However, the record indicates that FRANCO's claim was not ignored nor denied. Instead, she failed to respond to an inquiry requesting information needed to process

her claim. Since FRANCO has failed even to exhaust the requirements of the summary plan, she is barred from suing under ERISA.

Finally, FRANCO contests the district court's finding that AGA was not a fiduciary under ERISA, and was therefore not subject to a suit for breach of fiduciary duties under ERISA, 29 U.S.C. Section 1109. Under the plan, AGA created a committee to administer the plan. Therefore, it was the committee, and not AGA, which was the fiduciary. See Gelardi v. Pertec Computer Corp., 761 F.2d 1323, 1324 (9th Cir. 1985).

Therefore, the district court was correct in its grant of summary judgment against FRANCO.

AFFIRMED.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

MARY FRANCO

Plaintiff-Appellant,

vs.

AMERICAN GAS ASSOCIATION LABORATORIES, PACIFIC COAST BRANCH; AMERICAN GAS ASSOCIATION EMPLOYEES' UNION OF THE AMERICAN GAS ASSOCIATION LABORATORIES, PACIFIC COAST BRANCH; and AMERICAN GAS ASSOCIATION RETIREMENT COMM.

Defendants-Appellees.

CERTIFICATE OF SERVICE

The undersigned, CHRISTINE BLACK, of the Law Offices of DALE M. FIOLA, the Attorney for Plaintiff-Appellant, Mary Franco, hereby certifies that on the 10th day of August, 1990, she served the foregoing Petition for Writ of Certiorari on all the parties hereto, by mailing three copies by ordinary mail, postage pre-paid, addressed as follows:

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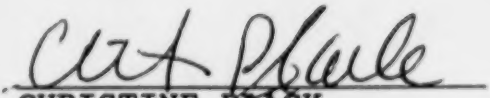

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Anaheim, CA 92802

Supreme Court, U.S.
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No. 90-275

In The

Supreme Court of the United States

October Term, 1990

MARY FRANCO,

Petitioner,

v.

AMERICAN GAS ASSOCIATION LABORATORIES, PACIFIC COAST BRANCH; AMERICAN GAS ASSOCIATION EMPLOYEES' UNION OF THE AMERICAN GAS ASSOCIATION LABORATORIES, PACIFIC COAST BRANCH,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. WHETHER THE NINTH CIRCUIT COURT OF APPEALS APPROPRIATELY CONCLUDED THAT PETITIONER MARY FRANCO'S EMPLOYMENT-RELATED CLAIMS AGAINST HER EMPLOYER AND HER UNION WERE PREEMPTED BY SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT AND SECTION 8(a)(2) OF THE NATIONAL LABOR RELATIONS ACT?

2. WHETHER THE NINTH CIRCUIT COURT OF APPEALS CORRECTLY DETERMINED THAT PETITIONER MARY FRANCO'S ALLEGATION OF MENTAL INCAPACITY DURING THE LIMITATIONS PERIOD OF SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT DID NOT TOLL THAT LIMITATIONS PERIOD BECAUSE HER RETENTION OF COUNSEL DURING THAT PERIOD PROVIDED HER WITH THE "MEANS TO KNOWLEDGE"?

3. WHETHER THE NINTH CIRCUIT COURT OF APPEALS' FACTUAL DETERMINATION THAT, "FRANCO'S CLAIM [FOR RETIREMENT BENEFITS] WAS NOT IGNORED NOR DENIED", AND THAT PETITIONER FAILED TO RESPOND TO AN INQUIRY REQUESTING INFORMATION NEEDED TO PROCESS HER RETIREMENT BENEFIT CLAIM SHOULD RENDER CONSIDERATION IN THIS COURT OF PETITIONER'S "EXHAUSTION OF REMEDIES" ARGUMENT UNNECESSARY?

QUESTIONS PRESENTED – Continued

4. WHETHER THE NINTH CIRCUIT COURT OF APPEALS PROPERLY CONCLUDED THAT PETITIONER'S CORPORATE EMPLOYER, AMERICAN GAS ASSOCIATION, IS NOT A FIDUCIARY OF THE RETIREMENT PLAN BECAUSE IT IS A SEPARATE ENTITY FROM THE RETIREMENT COMMITTEE DESIGNATED BY THE PLAN DOCUMENTS AS THE PLAN ADMINISTRATOR, AND IT IS NEITHER THE TRUSTEE, THE INVESTMENT MANAGER NOR THE PLAN ACTUARY?

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MARY FRANCO,

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v.

AMERICAN GAS ASSOCIATION LABORATORIES, PACIFIC COAST BRANCH; AMERICAN GAS ASSOCIATION EMPLOYEES' UNION OF THE AMERICAN GAS ASSOCIATION LABORATORIES, PACIFIC COAST BRANCH,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

Respondent American Gas Association respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Ninth Circuit's opinion in this case.

The tentative ruling of the District Court is not reported, and is reprinted in the Petition as Appendix A. The tentative ruling is not reproduced herein other than

to correct typographical errors, said corrections set forth in Appendix 1 herein. The Memorandum of Decision and Order of the District Court is not reported, and is reprinted in the Petition as Appendix B. The Memorandum is not reproduced herein other than to correct typographical errors, said corrections set forth in Appendix 2 herein. The opinion of the Court of Appeals for the Ninth Circuit is not reported, and is reprinted in the Petition as Appendix C. The opinion is not reproduced herein.

STATEMENT OF THE CASE

A. Nature Of The Case

Petitioner Mary Franco was employed by Respondent American Gas Association ("AGA") in its testing laboratory in Los Angeles, California and was a union member. Petitioner began her employment in 1951 and was employed until her retirement on July 1, 1984. Petitioner's 70th birthday occurred in March, 1984. In 1957, Petitioner was asked if she wished to participate in AGA's Retirement Plan, and declined in writing to do so.

On February 9, 1984, Petitioner left her place of employment, stating she had had an accident. Thereafter, despite repeated attempts by employees of AGA both orally and in writing to contact her, Petitioner was not directly heard from again. On July 1, 1984, AGA retired Petitioner and commenced her retirement benefits thereafter.

On September 5, 1984, AGA received a letter from Ronald Dean, Esq., which letter stated in relevant part:

> "I have been retained to represent Mary Franco and to assist her in understanding the employee benefits currently available to her, and to assure her that the benefits offered are indeed the benefits to which she is entitled."

AGA responded, providing the information requested.

On October 15, 1985, AGA received a letter from the law firm of LeMaire and Faunce. That letter stated in relevant part:

> "Could you please advise us what the current status is with respect to the various benefits and insurance programs which Mary Franco had with your company."

Again, AGA provided all the information requested.

Finally, in November, 1986, AGA received correspondence from Petitioner's third attorney, Dale M. Fiola, Esq., her present counsel, inquiring about her various employment benefits. AGA, for the third time, complied with the Petitioner's request for information and materials. After an exchange of correspondence, AGA requested certain information from Petitioner so it could be absolutely sure no mistake had been made regarding provision of her various benefits. Petitioner never responded to that request for information; rather, in May, 1987, she filed her first complaint.

AGA has been and is providing all of Petitioner's retirement and other benefits.

B. The Initial Proceedings

On May 11, 1987, Petitioner filed her original Complaint in the United States District Court for the Central

District of California against AGA and her union, "American Gas Association Employees' Union of the American Gas Association Laboratories, Pacific Coast Branch"[1]. Petitioner's Complaint contained causes of action for: (1) unlawful discharge in breach of the union's duty of fair representation; (2) for employee benefits under a collective bargaining agreement; (3) fraud and deceit; (4) unfair labor practices; (5) breach of written contract; (6) breach of fiduciary duty; and (7) breach of fiduciary duty under ERISA. Petitioner alleged in the opening paragraph of her Complaint that she was bringing the action under Section 301 of the Labor Management Relations Act, and attached as an exhibit a copy of the relevant collective bargaining agreement which existed between AGA and her union.

AGA filed a Motion to Dismiss or in the Alternative Motion for Summary Judgment, which motion primarily focused on Petitioner's failure to pursue her claims within the six-month statute of limitations period mandated by this Court in *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 161, 103 S.Ct. 2281 (1983). Petitioner's opposition consisted primarily of an argument that, because of Petitioner's claimed mental incapacity, the six-month statute of limitations should be tolled, relying primarily on her concept of state law regarding tolling. The Honorable Pamela A. Rymer, United States District Court Judge, held the limitations period not to be tolled and dismissed six of the seven causes of action alleged in the Complaint. Judge Rymer instructed the

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[1] Although named as a party defendant, her union was never served.

parties to attempt to administratively resolve the remaining ERISA claim.

Although the ERISA claim survived, Petitioner filed a First Amended Complaint containing ERISA claims, in which she named as an additional party defendant the American Gas Association Retirement Committee ("AGARC").

Petitioner then subsequently filed in state court a complaint which set forth essentially the same claims against AGA which had been dismissed by Judge Rymer.

AGA removed Petitioner's state court complaint to federal court and filed a Motion to Dismiss; it also moved to dismiss plaintiff's First Amended Complaint. Petitioner filed a motion to remand her removed state court action. All these matters were consolidated and heard by Judge Rymer on April 25, 1988. On August 8, 1988, Judge Rymer granted AGA's motions, dismissing the First Amended Complaint against AGA and dismissing the removed state court complaint in its entirety.

C. The Appeal

Several appeals were filed by Petitioner at various stages during the pendency of this matter before the District Court. The first appeal was filed on November 13, 1987, following the District Court's rulings concerning Petitioner's original complaint. On September 6, 1988, Petitioner filed a second notice of appeal regarding the dismissal of her amended and state court complaints. Thereafter, it was stipulated between counsel for the parties that Petitioner would dismiss with prejudice her one

remaining claim, under ERISA, against AGARC so as to perfect her appeal. Following this dismissal, Petitioner filed notice of a third appeal.

The three appeals were consolidated and argued before the Ninth Circuit on March 7, 1990.

On May 14, 1990, the Ninth Circuit issued its opinion affirming the District Court's orders dismissing the Petitioner's complaints. The Court of Appeals found that Petitioner's various claims against AGA were preempted by Section 301. It held that her claim that the applicable six-month limitations period was tolled failed because, whether or not she was in fact mentally incapacitated, her retention of counsel provided her with the "means to knowledge" that she must file any claim within the period, in accordance with its decision in *Stallcop v. Kaiser Foundation Hospitals*, 820 F.2d 1044 (9th Cir. 1987), *cert. denied*, 484 U.S. 986 (1987). The Court of Appeals found Petitioner's ERISA claims were barred because she had failed to exhaust her administrative remedies under the subject Retirement Plan. The Court further found that AGA was not a fiduciary within the meaning of ERISA.

D. The Petition For Writ Of Certiorari

This Petition for Writ of Certiorari attempts to invoke this Court's jurisdiction by misstating the facts and the law. Specifically, Petitioner claims this Court has not "formally ruled upon" the issue of the borrowing of tolling provisions from state law in the context of Section 301 actions (Pet., pp. 17-18). This Court has so essentially ruled. Petitioner further claims that the Ninth Circuit has rendered a decision which is in conflict with a state court

of last resort (Pet., p. 18). The Ninth Circuit's decision is not in conflict with any decision of the California Supreme Court, which AGA assumes is the "state court of last resort" Petitioner is referring to.

Finally, Petitioner has misstated the factual predicate to her argument that the statute of limitations should be tolled. Simply stated, there was no credible evidence presented to either the District Court or the Court of Appeals that Petitioner is mentally incapacitated. Rather, what the evidence does show is that Petitioner retained counsel during the limitations period to represent her concerning the issues involved in this case.

REASONS WHY THE PETITION SHOULD BE DENIED

1. Petitioner's Claims Are Preempted By Section 301 Of The Labor Management Relations Act.

Petitioner asserts that several of her claims against AGA and her union are not preempted by Section 301 of the Labor Management Relations Act (29 U.S.C. Section 185) ("Section 301"). The short, yet complete, response to this was rendered by Judge Rymer in her Memorandum Decision and Order dismissing Petitioner's claims, set forth at page B-20 of the Petition: "[Petitioner] admits that her claims depend on a finding that 'in fact there was no union in place and the collective bargaining agreement in essence was a sham'. *Id. This type of claim seems to be almost a paradigm example of a hybrid Section 301 case.* (emphasis added)." In so stating, Judge Rymer was following the teaching of this Court in *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 108 S.Ct. 1877 (1988), which

mandates Section 301 preemption of any state law claim which requires the interpretation of a term of a collective bargaining agreement for resolution.[2]

AGA respectfully submits the Court of Appeals' decision, which also applied well-established federal labor law principles to dismiss Petitioner's claims, was correctly decided and does not warrant the exercise of a grant of certiorari.

II. Contrary To Petitioner's Assertion, The Court Of Appeals' Decision Is Not In Conflict With That Of A State Court Of Last Resort.

Rule 10.1(a) of this Court's Rules states that a sufficiently special and important reason for granting certiorari may occur when a United States Court of Appeals has decided a federal question in a way in conflict with a state court of last resort. Petitioner appears to be claiming such a reason exists with respect to the issue of the application of tolling provisions under state law to federal statutes of limitations. This simply is not the case. There is not cited by Petitioner in her Petition any California Supreme Court decision on this issue. Evidently, the decision which Petitioner is relying on is *Pearl v. Pearl*, 177 Cal. 303, 177 P. 845 (1918). However, this decision involving a plaintiff *found* to be mentally incapacitated, stands for the proposition that California Code of Civil Procedure Section 352 means what it says – certain *state*

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[2] The Court of Appeals' determination of the preemptive effect of Section 301 on Petitioner's state court complaint was based on well-established federal labor law principles and disposes of her remand arguments.

statutes of limitations are tolled for the period of time that a plaintiff is insane. Section 10(b) of the National Labor Relations Act (29 U.S.C. 160(b)), the *federal* statute of limitations at issue herein, is not discussed in *Pearl v. Pearl, supra.*

Reaching its conclusion that the limitations period was not tolled, the Court of Appeals herein was applying well established *federal* common law tolling principles to a *federal* statute of limitations. Specifically, the Court of Appeals applied the "means to knowledge" test it had fashioned in *Stallcop v. Kaiser Foundation Hospitals, supra,* a case in which the plaintiff was also urging the tolling of Section 10(b)'s limitations period. As in *Stallcop, supra,* the Court of Appeals herein found that Petitioner's retention of counsel during the limitations period obligated her to take some action within that period. There is no relationship, much less a conflict, between the Court of Appeal's decision in *Stallcop* and herein, and the California Supreme Court's decision in *Pearl v. Pearl, supra.* Accordingly, AGA respectfully submits that Petitioner's argument on this point provides no basis warranting this Court's exercise of its certiorari jurisdiction.

III. The Tests To Be Applied For The Application Of Tolling In Section 301 Actions Implied In This Court's Decision Of *DelCostello v. International Brotherhood Of Teamsters* Have Been Followed By The Federal Courts.

Petitioner claims this Court has not "formally" decided whether state tolling provisions should be applied to the six-month limitations period of Section 301 actions. If Petitioner is asserting that this Court has not

determined this issue and instructed lower courts regarding the principles to be applied, Petitioner is incorrect.

After holding in *DelCostello, supra,* that Section 10(b)'s limitations period applies to Section 301 actions, this Court noted that one of the cases before it may have involved a tolling issue and remanded that case to the appropriate district court for further proceedings consistent with its opinion. *DelCostello, supra,* at p. 172. In the subsequent decision, *DelCostello v. International Brotherhood of Teamsters,* 588 F.Supp. 902 (D. Md. 1984), *aff'd,* 762 F.2d 1219 (4th Cir. 1985) the district court, in finding that the claim was not tolled, stated at p. 907: "The question of when a federal cause of action 'accrues' and the related question of whether it is 'tolled' by subsequent conduct or events *are federal questions determined by federal law.* [Citations omitted]." (emphasis added)

In so stating, the district court underscored this Court's holding that this issue is one of federal law, which holding makes state tolling provisions irrelevant. Numerous subsequent decisions, including *Stallcop, supra,* are in accord. The courts have perceived the chaos which would result if fifty different state tolling provisions were applied to the uniform federal limitations period under Section 301. AGA therefore respectfully submits that Petitioner's claim that this Court has failed to "formally" rule on this issue does not constitute a special or important reason which would warrant the granting of certiorari.

IV. There Is No Credible Evidence Which Substantiates Petitioner's Claims Of Mental Incapacity.

Petitioner's claim that she has been mentally incapacitated since 1984 is one which obviously invokes the

sympathy of everyone involved in this matter, not least that of AGA and its employees, many of whom attempted to contact Petitioner and inquire as to her condition. Such feelings of sympathy, however, often imbue legal disputes with an importance they otherwise would not have.

AGA raises this point only because there is no credible evidence which substantiates Petitioner's claim that she had been mentally incapacitated, and therefore unable to protect her rights. Indeed, in August, 1987, Petitioner submitted a declaration signed under penalty of perjury in opposition to AGA's Motion to Dismiss. This declaration set forth in great detail Petitioner's reasons for taking various steps concerning her claims since 1984, including her retention of her two prior attorneys. Such a declaration is, to say the least, inconsistent with a claim of mental incapacity.

Under these circumstances, AGA respectfully submits that the legal issues involved in the Petition, in addition to having been decided correctly below, simply are not important enough to warrant an investment of this Court's resources.

V. Petitioner Has Failed To Assert Any Grounds Under Rule 10 For Review Of The Conclusions Of The Courts Below Relating To Any Factual Or Legal Issues Under ERISA.

Petitioner has made no attempt to invoke this Court's jurisdiction under Rule 10 concerning her claims under ERISA. The Petition is bereft of any claim that the Court's decision below is in conflict with any other court of appeals, or any of the other recognized jurisdictional

bases for the granting of petitions for a writ of certiorari by this Court. Accordingly, AGA respectfully submits that the ERISA issues "raised" by Petitioner (encompassing the definition of "fiduciary", which is well-settled, and the findings of the courts below regarding Petitioner's failure to exhaust the administrative remedies of the Retirement Plan) do not warrant review by this Court.

VI. The Corporate Employer's Non-Fiduciary Status Is Based Upon Factual Findings By The District Court Which Have Been Reviewed And Adopted By The Court Of Appeals.

Petitioner asserts that "[i]t is patently evident that A.G.A. controls and manages the Plan and is a fiduciary under the definition of *29 U.S.C. Section 1002(21) (A).*" (Pet. p. 56). Petitioner's assertion is contrary to the findings of fact made by the District Court and adopted by the Court of Appeals.

Specifically, the District Court found (see Pet. App. B-4 to B-7):

- AGA established a Retirement Plan ("Plan") and Petitioner is a beneficiary;
- "Under the terms of the Plan, [AGA] is the 'Employer' ";
- **AGARC is the "Plan Administrator";**
- The Plan provides that the president of AGA is Chairman of AGARC and other members of AGARC are appointed by AGA's Board of Directors;

- "According to the Plan, [AGARC] determines the payment of benefits and hears appeals of denied claims";
- "The Trustee is the fiduciary responsible for the Plan assets";
- The Investment Manager, Lazard Freres and Company, is the fiduciary that Manages the assets of the Plan;
- The Plan Actuary, Alexander and Alexander, computes the retirement benefits for all retired employees of AGA;
- **The Plan provides that the "Authority of each named fiduciary shall be exclusive".**

Under ERISA principles, an employee benefit plan's Administrator, Trustee, Investment Manager, or Actuary may be fiduciaries. The District Court herein found that AGA did not act in any of these capacities. Based upon the District Court's findings, it is clear that AGA, the corporate employer, is not a "fiduciary" under ERISA. Indeed, in the case cited by Petitioner for this proposition, the corporate employer was found *not* to be a fiduciary under ERISA. *Boyer v. J.A. Majors Co. Employees' Profit Sharing Plan*, 481 F.Supp. 454 (N.D. Ga. 1979). As in the *Boyer* case, the administration of AGA's Plan was vested in a committee appointed by its Board of Directors. The District Court herein found that the AGA Plan specifically designates AGARC as the "Plan Administrator". There is no factual basis for Petitioner's assertion that AGA is a fiduciary. Accordingly, no grounds exist for review by this Court of the Court of Appeals' conclusion that "it was the committee, and not AGA, which was the fiduciary". (Pet. App., p. C-7).

AGARC (the Plan Administrator under the express terms of the Plan as found by the District Court) at one point was a defendant in this case; however, Petitioner stipulated to dismiss it with prejudice on November 18, 1988. Accordingly, Petitioner's claim that AGA is a "fiduciary" within the meaning of ERISA can be viewed as an attempt to avoid the effects of her own actions below. *See Leonelli v. Pennwalt Corp.*, 887 F.2d 1195 (2d Cir. 1989) (ERISA claim barred by failure to name Pension Administrative Committee as defendant).

Furthermore, Petitioner's references to AGA's Board of Directors are beside the point: they were never named as defendants. *Cf.*, 29 U.S.C. Section 2509.75-8(D-4) (setting forth limited circumstances under which individual members of an employer's board of directors may be considered fiduciaries).

In addition, Congress did not intend for the fiduciary duty provisions of ERISA to apply to an employer whose participation in its employee benefit plan is limited to sponsorship and funding. This is the case because a fiduciary under ERISA is vested with a duty of care and must carry out his duties "with respect to a plan solely in the interest of the participants and beneficiaries and . . . for the exclusive purpose of . . . providing benefits to participants and their beneficiaries . . . ". 29 U.S.C. Section 1104(a)(1). Congress recognized that to impose such standards on an employer whose participation was limited to sponsorship and funding would create intractable conflict-of-interest issues. Only in truly exceptional cases can ERISA's fiduciary duty provisions be read to apply to an employer which sponsors an employee benefit plan,

circumstances which the Court of Appeals correctly decided do not exist herein.

CONCLUSION

The Petition's arguments misstate the findings of fact of the District Court and the legal issues resolved by the District Court and the Ninth Circuit Court of Appeals based upon long standing precedent. AGA respectfully submits that plenary review by this Court is unwarranted.

For the foregoing reasons, AGA respectfully submits that the petition for writ of certiorari should be denied.

Dated: September 12, 1990.

Respectfully Submitted,

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APPENDIX 1

CORRECTION OF TYPOGRAPHICAL ERROR IN APPENDIX A OF THE PETITION

1. Appendix A of the Petition, at page A-18 states in relevant part beginning the seventh line from the top of the page:

> Unless without waiting for a request, than its inaction does not constitute fraud.

This sentence as set forth in the District Court's tentative ruling states in relevant part:

> Unless **the union has an *affirmative* duty to investigate a member's claims** without waiting for a request, than [sic] its inaction does not constitute fraud. (emphasis added, underlining in the original)

APPENDIX 2

CORRECTION OF TYPOGRAPHICAL ERRORS IN APPENDIX B OF THE PETITION

1. Appendix B of the Petition, at page B-7, states in relevant part beginning the sixth line from the top of the page:

> 10. The Plan provides that, "The **Actuary** of each named fiduciary shall be exclusive, . . . " Plan, Paragraph 12.20(b).

This sentence as set forth in the District Court's Memorandum states in relevant part:

> 10. The Plan provides that, "The **Authority** of each named fiduciary shall be exclusive, . . . " Plan, Paragraph 12.20(b). (emphasis added)

2. Appendix B at pages B-19 and B-20 states in relevant part:

> Yet Court cannot discern how Petitioner can prove fraud or breach of duty or infliction of emotional distress without proving that her rights under the collective bargaining agreement were violated.

This sentence as set forth in the District Court's Memorandum, states in relevant part:

> Yet the Court cannot discern how Plaintiff can prove fraud or breach of duty or infliction of emotional distress without proving that **she had rights under the collective bargaining agreement and that her rights were violated.** (emphasis added)

3. Appendix B at page B-20 omitted the following paragraph from the District Court's Memorandum:

> **The decision whether to grant plaintiff leave to amend the complaint is within the sound discretion of the district court. Fed. R. Civ. P. 15; *Keniston v. Roberts*, 717 F.2d 1295 (9th Cir. 1983). In most cases leave to amend should be granted.**

Id. In this case, however, plaintiff has had considerable opportunity to allege non preempted state claims. As the present complaint indicates, any state claims will necessarily involve the existence and scope of the collective bargaining agreement. Any renewed claims that plaintiff purged of the collective bargaining language therefore would merely be en exercise in artful pleading. Allowing leave to amend therefore would be a waste of time and money for both parties. Under these circumstances, leave to amend is not warranted. 3 Moore's Federal Practice, ¶ 15.10 at 15-106.